No. A-610

IN THE

83-6405

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

DAN EDWARD ROUTLY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

I. Whether the Petitioner's conviction for first degree murder was impermissibly tainted by the trial court's admission of an involuntary confession in violation of Petitioner's Fifth and Fourteenth Amendment rights?

II. Whether a death sentence imposed on the basis of secred non-statutory aggravating circumstances in a presentence investigation report denied due process of law and subjects a defendant to cruel and unusual punishment?

III. Whether in affirming Petitioner's death sentence, the Supreme Court of Florida has adopted such a broad and vague construction of the standards governing the propriety of a death sentence imposed over a jury verdict of life imprisonment so as to violate the Fifth, Seventh, Eighth and Fourteenth Amendments?

IV. Whether a trial judge's overriding a jury's factually based decision against the death penalty must, in all cases, violate the Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States?

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida filed on September 22, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Florida, Case No. 60,066, is reported at 440 So.2d 1257 (Fla. 1983) and is set out in Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was filed on September 22, 1983, and rehearing was denied on December 12, 1983. See Appendix B. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States, issued an order extending the time within which to file this petition to and including March 12, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States. It further involves Section 921.141, Florida Statutes (1977), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence." Because of its length, the statute is set out in its entirety in Appendix C.

STATEMENT OF THE CASE

On June 23, 1979, a body was discovered in a field in Marion County, Florida (R-647).[1] Dental records identified the decedant as Anthony Bockini (R-760), and an autopsy suggested gunshot wounds as the cause of death (R-733).

Petitioner was arrested as a suspect wanted for questioning and for unspecified criminal charges on December 5, 1979 in Flint, Michigan in the early morning hours (R-981). Police officers testified that they learned about Petitioner from a statement given by Petitioner's girlfriend/accomplice, Colleen O'Brien, who was pregnant with Petitioner's child (R-982).

After arrest Petitioner was questioned separately by Florida and Michigan authorities (R-202). He has testified that he does not recall being Mirandized prior to the questioning (R-259). Petitioner testified that he admitted giving the confession but later retracted it, stating that it was given in exchange for the promised release of Ms. O'Brien and the promise by police officers that he would be prosecuted only for the lesser offense of second degree murder if he confessed (R-260-1). The police officers testified that they made no such promise to Petitioner (R-242). At 2:17 p.m. the same day Petitioner waived extradition on the charge of second degree murder, and at 4:00 p.m. that day an information was filed in the State of Florida charging Petitioner with the offense of second degree murder (R-2,98-101). Colleen O'Brien was released from custody shortly after Petitioner gave the confession (R-254).

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[1] The symbol "R" will be used herein to refer to the transcript of trial proceedings and the record-on-appeal in the Florida Supreme Court below. The symbol "SR" will be used herein to refer to items in the supplemental record.

The Petitioner was transported to Marion County, Florida that evening. On December 8, 1979, the Marion County Grand Jury was specially convened and returned an indictment against Petitioner for first degree murder (R-1-7).

Petitioner's trial commenced July 14, 1980, before the Honorable Carven Angel, Judge of the Circuit Court of the Fifth Judicial Circuit of Florida in and for Marion County. The State's chief witness was Colleen O'Brien who was given immunity for her testimony (R-923). O'Brien testified that she and Petitioner had traveled to Florida together and had found work in a town near Ocala (R-878). Thereafter the two experienced domestic difficulties and O'Brien was picked up as a hitchhiker by Anthony Bockini on one of several occasions she left Petitioner. O'Brien testified that she stayed the night with Bockini on one occasion, became frightened when he made advances, returned to Petitioner to whom she related her fear (R-932-33). O'Brien testified that she returned to Bockini's residence several days later because she had "no where else to go." (R-936).

O'Brien testified that on the second occasion she stayed with Bockini the Petitioner came to the house in an attempt to reconcile with her (R-940). O'Brien testified that while the two were there, Bockini returned unexpectedly, that Petitioner started to leave and then apparently confronted Bockini with a weapon, tied him up, and placed him in the trunk of Bockini's vehicle (R-892). O'Brien testified that the three then left in Bockini's vehicle until the tail lights of the vehicle became inoperative (R-894). O'Brien testified that Petitioner then told her to get out of the car with him, that she "heard a bunch of shots" and that she and Petitioner dragged Bockini's body into a field (R-894-96). According to O'Brien the two then fled the State of Florida in Bockini's vehicle (R-897).

When the State sought to introduce Petitioner's tape recorded confession, Petitioner renewed the objections he had tendered at his pretrial suppression hearing concerning its admissibility (R-987, 199-272). Nevertheless the confession was admitted as evidence in the State's case in chief (R-1031).

The jury convicted Petitioner of first degree murder (R-1180). Immediately thereafter advisory sentence proceedings were commenced with the State presenting evidence in aggravation followed by the Defendant's presentation in mitigation (R-1189-1204). The jury deliberated approximately one hour before returning its advisory verdict of life imprisonment (R-1225). Judge Angel thereafter ordered the Department of Corrections to prepare a presentence investigation report prior to sentencing (R-1229).

Sentence hearings were held on September 15, 1980 and on November 24, 1980 (R-1249-1309). At the first sentence hearing Petitioner was provided with copy of the presentence investigation report prepared by the Florida Department of Corrections (R-1250). No evidence was presented at either sentence hearing.

At the close of the second sentence hearing Judge Angel announced that upon consideration of the evidence presented at trial, the evidence presented at the separate sentence proceeding on the issue of penalty, the jury advisory sentence, the presentence investigation report prepared by the Florida Department of Corrections, and the statements and recommendations of counsel for the Defendant and the State, the Court finds that the capital felony was committed while the Defendant was engaged in the commission of kidnapping, that the capital felony was committed while the Defendant was engaged in flight after committing a burglary, that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, that the captial felony was committed while the defendant was engaged in the commission of a robbery and while the Defendant was engaged in flight after having committed a robbery, and therefore the capital felony was committed for pecuniary gain, that the capital felony was especially heinous, atrocious and cruel, and that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R-1303). Judge Angel further announced that he found no mitigating circumstances and therefore sentenced

Petitioner to death by electrocution (R-1306).

Petitioner appealed the conviction and sentence to the Florida Supreme Court, which affirmed, Routly v. State, 440 So.2d 1257 (Fla. 1983). Petitioner then filed in this Court for certiorari review.

I. PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER WAS IMPERMISSIBLY TAINTED BY THE TRIAL COURT'S ADMISSION OF AN INVOLUNTARY CONFESSION IN VIOLATION OF PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

The issue presented here requires resolution by this Court because it was decided below in a manner inconsistent with this Court's pronouncements in Miranda v. Arizona, 384 U.S. 436 (1966), and its progeny. The federal question directly involves the constitutional dangers addressed in numerous decisions of this Court concerning the admissibility of compelled self incrimination in state court criminal prosecutions.

The admission and use of Petitioner's tape recorded confession in this conviction and sentence of death is of added constitutional significance because the confession contained the sole evidence considered in support of two of the aggravating circumstances upon which the death penalty was imposed.

The confession was given within an hour of Petitioner's arrest as a suspect wanted for questioning and on unspecified criminal charges. At the time of Petitioner's arrest he was made aware that his pregnant girlfriend was also in custody.

Petitioner was questioned separately by Florida and Michigan authorities. He does not recall being mirandized prior to questioning. Petitioner admitted that he gave police officers a confession but later retracted the confession, stating that it was given in exchange for the promised release of his girlfriend and the promise that he would be prosecuted for the lesser offense of second degree murder. The police officers testified that they made no such promise to Petitioner.

It is undisputed that Petitioner's waiver of extradition proceedings, held later that day, reflect the charge of second degree murder, that a charging instrument alleging the charge of second degree murder was later filed, and that Petitioner's girlfriend/accomplice was released from custody shortly after Petitioner gave the confession.

Petitioner timely moved to suppress the confession prior to trial, and renewed his objection when it was proffered. The confession was nevertheless admitted at trial and was no doubt the most significant evidence of guilt in the State's case in chief.

The Petitioner was convicted of first degree murder and at the advisory sentence proceedings the State argued that the murder was aggravated by evidence that the homicide was committed during commission of a robbery and kidnapping, that it was committed for pecuniary gain, that it was especially heinous, atrocious or cruel, and that it was committed in a cold, calculated and premeditated manner. The Petitioner thereafter presented evidence of mitigating circumstances and the jury returned its advisory verdict of life imprisonment.

Petitioner was sentenced to death approximately four months later. The death sentence was imposed despite the jury verdict on the basis of the court's finding of five aggravating circumstances and no mitigating circumstances. The five aggravating circumstances alleged in support of the trial judge's findings were that the capital felony was committed while the Defendant was engaged in the commission of kidnapping, that the capital felony was committed while Defendant was engaged in flight after committing a burglary, that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest, that the capital felony was committed while the Defendant was engaged in the commission of a robbery and while the Defendant was engaged in flight after having committed the robbery, and therefore the capital felony was committed for pecuniary gain, that the capital felony was especially heinous, atrocious and cruel, and that the capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. The Florida Supreme Court affirmed both the conviction and sentence. Routly v. State, 440 So.2d 1257 (Fla. 1983).

Admission of the confession was contrary to this Court's construction of the Fifth Amendment as incorporated to the states through the Fourteenth Amendment, as well as to a number of Florida State court decisions. This Court, as well as Florida courts, have held that where the state seeks to use as evidence a defendant's out of court statement resulting from custodial interrogation it has the burden of proving (1) that Miranda

warnings were given; (2) that after complete Miranda warnings were given, a waiver of said rights was made; (3) that the waiver was voluntary, knowingly and intelligently made; and (4) that the statement itself was freely and voluntarily made. Lego v Twomey, 404 U.S. 477 (1972), Reddish v. State, 167 So.2d 858 (Fla. 1964).

The above requirements for admission presuppose that the warnings, waiver and statement follow a lawful arrest, for if the arrest is illegal, the statement must be suppressed notwithstanding proof that there was compliance with the foregoing. Brown v. Illinois, 422 U.S. 590 (1975). The legality of detention must be proven not to satisfy the Fifth Amendment guarantee against self-incrimination, but rather to satisfy the protection against unreasonable search and seizure as guaranteed by the Fourth and Fourteenth Amendments.

A waiver of the right to counsel and against self-incrimination cannot be presumed from a silent record, nor can waiver be presumed by proof of the fact that a confession eventually followed. Waiver of these rights cannot be proven simply by the fact that the defendant answered questions, or that the silence was broken any more than the validity of a search can be established by the "fruit" it produces.

In Brewer v. Williams, 430 U.S. 387 (1977) this Court defined the legal standards by which the state's proof must be measured:

> ...that it was incumbent upon the state to prove "an intentional relinquishment or abandonment of a known right or privilege (citations omitted)...that the right to counsel does not depend upon a request by the defendant (citations omitted)...and that the courts indulge in every reasonable presumption against waiver... (citations omitted).

Since 1897 this Court has recognized that for a statement to be admissible it must be freely and voluntarily given, not obtained by any direct or implied promise, however slight, nor obtained by the exertion of any improper influence. Bran v. United States, 178 U.S. 532 (1897), Frazier v. State, 107 So.2d 16 (Fla. 1958).

In order to prove that a confession is voluntary the state

must show that the confessor gave his statement with a fair appraisal as to the use of the confession and the confessor's true position with regard to that use. Harrison v. State, 12 So.2d 307 (Fla. 1942). An accused from whom a confession is sought should be free from the influence of either hope or fear, and the confession must be excluded if the totality of the surrounding circumstances were calculated to delude the accused or to exert an undue influence over him. Jarriel v. State, 317 So.2d 141 (Fla. 4th DCA 1975), M.D.B. v. State, 311 So.2d 399 (Fla. 4th DCA 1975).

The State failed to meet its constitutional burden of proof in the introduction of Petitioner's confession. The totality of the circumstances surrounding the confession made it inherently untrustworthy as evidence in light of Petitioner's testimony at the suppression hearing, particularly where the testimony was corroborated by undisputed facts in the record. The undisputed facts lend substantial credence to Petitioner's testimony that the confession was given to secure the release of Colleen O'Brien and in exchange for a promise of prosecution for a lesser offense. Under the circumstances it should have been suppressed.

It is also noteworthy that the confession was the sole evidence of at least two of the aggravating circumstances alleged in support of the death penalty. There was no extrinsic evidence in the record that a robbery or burglary accompanied the homicide or that the homicide was committed for pecuniary gain. Accordingly the confession would have been inadmissible, upon objection, for the purpose of establishing the corpus delecti of those offenses if the offenses had been charged in a separate indictment or as additional counts in this indictment.

Under the circumstances, consideration of aggravating circumstances based solely on a defendant's confession raises serious due process considerations. Our legal system has traditionally declined to base a criminal conviction solely on evidence out of the mouth of the accused. It would seem therefore that an even stricter standard should be followed where the state seeks to use the information in support of a decision to impose

the death sentence.

Petitioner's conviction and sentence was fundamentally tainted by the trial court's admission of the confession. Accordingly, this Court should grant a writ of certiorari in order to allow Petitioner to more fully develop the arguments set forth within.

II. A DEATH SENTENCE IMPOSED ON THE BASIS OF SECRET NON-STATUTORY AGGRAVATING CIRCUMSTANCES IN A PRESENTENCE INVESTIGATION REPORT DENIES DUE PROCESS OF LAW AND SUBJECTS A DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT.

The issue presented here requires resolution by this Court because it was decided below in a manner inconsistent with this Court's pronouncements in Furman v. Georgia, 408 U.S. 238 (1972), Proffitt v. Florida, 428 U.S. 242 (1976), and Gardner v. Florida, 430 U.S. 349 (1972). The federal question directly involves the constitutional dangers inherent in a death penalty imposed on the basis of a presentence investigation report which alleges secret non-statutory aggravating circumstances and where the defendant is afforded no effective procedure to controvert the allegations.

Advisory sentence proceedings were commenced immediately after Petitioner's conviction for first degree murder. At these proceedings both the State and Petitioner presented evidence with regard to sentence. At the close of the proceedings the jury, after deliberating approximately one hour, returned its advisory sentence verdict of life imprisonment. Thereafter Judge Angel ordered the Florida Department of Corrections to prepare a presentence investigation report and set sentencing at a future date.

There were two sentence hearings, at the first of which Petitioner and his counsel were invited to review the presentence investigation report and make comments thereon.

Petitioner's comments consisted of objections to the report. The gist of the objections were that Petitioner had no effective way to deal with the information in the report because it consisted of accusatory allegations concerning the offense and Petitioner's background, allegations that the Petitioner had committed another offense while in custody subsequent to his conviction, certain anonymous allegations concerning the Petitioner's guilt in the instant offense, and the opinions of prosecution witnesses and correction officers that the Petitioner should be executed.

Approximately two months later Judge Angel held another sentence hearing. As in the case of the first hearing, no new

evidence was presented beyond the presentence investigation report and the arguments of counsel. At the close of the hearing Judge Angel pronounced the death sentence against Petitioner, specifically stating that it was based on his consideration of the evidence at trial and at the separate sentence proceedings, the jury's advisory sentence, the presentence investigation report, and the arguments of counsel.

Judge Angel specifically stated that he gave the presentence investigation report consideration in his decision to impose the death sentence. In fact it is reasonable to assume that the presentence report was the primary factor responsible for Judge Angel's decision since it contained the only information which differentiated his decision from that of the jury's.

In Gardner v. Florida, 430 U.S. 349 (1977), this Court reviewed the practice of withholding portions of presentence investigation reports in capital cases. In denouncing that procedure this Court found that a procedure for selecting people for the death penalty which permits consideration of secret information relevant to the character and record of the individual offender fails to meet the need for reliability in the determination that death is the appropriate punishment as required by Woodsen v. North Carolina, 428 U.S. 280 (1976).

Implicit in Gardner is the due process requirement that a capital defendant be afforded a sentencing proceeding in which he is given an opportunity to rebut or deny allegations offered in support of the death sentence. Equally implicit is the requirement that a sentencing court specifically disregard any information offered in support of the death sentence where the defendant is not given such an opportunity, or the information itself is of such a nature that the court can provide no meaningful way for the defendant to rebut the information, or where common sense dictates that the information is inherently unreliable. Gardner, supra, p. 360.

There was no meaningful way for Petitioner to rebut the information contained in his presentence report. Much of the information was phrased in the style of accusatory disbelief;

thus, for example, the preparer of the report states that "subject claims to have married Judy Ann Ray on 9-3-73" notwithstanding the fact that the marriage is verified in a latter protion of the same report. (SR-4). The same accusatory style characterizes the rest of the information pertaining to Petitioner's background.

The "confidential evaluation" section of the report rises from accusatory style to straight gossip. That section begins:

> When this officer interviewed subject he completely denied any guilt concerning the murder of Anthony Bockini. This officer has no doubts concerning the subject's guilt as he admitted in detail how he killed the victim to investigators at the sheriff's department. It has also been verified with contact by a trustee at the Marion County jail (who wished to remain anonymous due to fear), that Defendant vividly told him in a bragging manner how he killed Mr. Bockini. (SR-6).

In the same confidential evaluation section the opinions of six persons are offered who suggest that Petitioner should be executed. (SR-6,7). One might assume that this was an attempt to give Petitioner the benefit of an additional, informal jury trial had not each of the six been a prosecution witness or a correctional officer.

It is difficult to see how a constitutional death sentence could result from a proceeding in which the trial judge did not specifically disavow any consideration of this report. Although the confidential section was provided to Petitioner prior to his sentencing, there was no method by which Petitioner could effectively deny the accusatory allegations since they were in the nature of opinion or were derived from the secret sources denounced by this Court in Gardner. Common sense dictates that information concerning Petitioner which is derived from an anonymous fellow inmate is inherently unreliable and should be specifically excluded from any sentencing decision.

Yet not only did the trial court fail to exclude the report from its sentencing decision, but specifically identified the presentence investigation report in support of its consideration to impose the death penalty. Under the circumstances Petitioner

did not receive a constitutional sentence and this Court should grant a writ of certiorari.

III. IN AFFIRMING PETITIONER'S DEATH SENTENCE, THE SUPREME COURT OF FLORIDA HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE STANDARDS GOVERNING THE PROPRIETY OF A DEATH SENTENCE IMPOSED OVER A JURY VERDICT OF LIFE IMPRISONMENT SO AS TO VIOLATE THE FIFTH, SEVENTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Florida trial courts override jury life recommendations with some frequency. Because the issues raised in this petition have occurred in the past and will continue to recur in future cases,[2] this Court should grant certiorari.

Even assuming that Gardner v. Florida, supra, were not held to apply to preclude the death sentence in this case as a matter of law, a further issue of constitutional dimension is presented. That issue concerns the appropriate constitutional standards that must govern a judicial decision to overrule a jury's life verdict in Florida. The question presented in this case is whether definition and application of the jury override should be left solely to state law or whether the override is limited by the United States Constitution. That question is especially crucial where, as here, the decision to override the jury implicates the serious dangers of unreliability identified in Gardner. Petitioner will show that this Court's approval of Florida's override strongly suggests that certain procedural safeguards,

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2 See, e.g., Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1037 (1982); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert. denied, ____ U.S. ____, 102 S.Ct. 1739 (1982); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert. denied, ____ U.S. ____, 102 S.Ct. 364 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920 (1978); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978); Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U.S. 871 (1976); Goodwin v. State, 405 So.2d 170 (Fla. 1981); Odom v. State, 403 Fla. 1d 936 (Fla. 1981), cert. denied, ____ U.S. , 102 S.Ct. 1970 (1982); McKennon v. State, 403 So.2d 389 (Fla. 1981); Smith v. State, 403 Fla. 2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Shue v. State, 366 So.2d 387 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Burch v. State, 343 So. 2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (1976); Provence v. State, 337 So.2d 783 (Fla.), cert. denied, 431 U.S. 969 (1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Thompson v. State, 328 So.2d 1 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975).

adopted by the Florida Supreme Court but not followed in this case, are integral to the constitutionality of the override authority. In effect, this Court's approval of the override has been properly dependent upon the Florida courts adoption of some limiting principle that would bring the override within the ambit of constitutional acceptability. Although such a limiting principle is in part a matter of "state law", failure to follow that principle in this case resulted in deprivation of fundamental rights guaranteed of the federal Constitution.

A. This Case Presents a Significant Federal Question

This Court has suggested that Florida's jury override is constitutional on its face. See Barclay v. Florida, ____ U.S. _____, _____, _____, 103 S.Ct. 3418, 3425, 3427, 3428 (1983); id. at ____, 103 S.Ct at 3426-3427 (Stevens, J., concurring); Dobbert v. Florida, 432 U.S. 282, 295 (1977); Proffitt v. Florida, 428 U.S. 242 (1976). This Court's initial approval of the override was not, however, unqualified; it was contingent upon Florida's adherence to certain procedures governing administration of the override.

In evaluating this Court's facial acceptance of the override it is necessary to identify precisely what it is that makes Florida's procedure constitutional. In every case where this Court has had occasion to pass on the override, its approval has been based, in large measure, upon the procedural protections with which Florida has clothed its system. This Court in Proffitt v. Florida and Barclay v. Florida quoted with approval the principle adopted by the Florida Supreme Court in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975): "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no person could differ." See Proffitt v. Florida, 428 U.S. at 250; Barclay v. Florida, ____ U.S. at ____, 103 S.Ct. at 3425, 3427. More significantly, in Dobbert v. Florida, this Court described the "exacting standards of Tedder" as being a "crucial protection" that is "most important" to the capital punishment statute of Florida. 432 U.S. at 296.

Though in some sense Tedder is a matter of "state law", violation of Tedder in this case directly implicates rights protected by the United States Constitution. Decisions by this Court approving the jury override strongly suggest that without Tedder the override would create serious constitutional difficulties. Implicit in this Court's decision that a particular state procedure will staisfy constitutional requirements is the crucial assumption that the state will follow that procedure. In capital cases, it is precisely the clearly defined existence of and adherence to the state procedural rules that qualifies a sentencing decision as nonarbitrary and thus constitutionally permissible.

This Court validated a specific procedural scheme when it approved the override in Proffitt. Because the limitations imposed by Tedder make the override constitutional, ignoring these limitations implicates the constitution. Failure to abide by Tedder would result in the arbitrary imposition of the death penalty in violation of the Eighth Amendment. Having stated in Tedder that it will reject only those jury life recommendations that are utterly unreasonable, Florida must adhere to that standard.

The constitutional analysis urged by Petitioner is strikingly similar to that employed by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980). The issue in Godfrey was whether the aggravating circumstance delineated in Georgia Code. Ann. §17-10-30(b)(7), upon which Godfrey's death sentence was based, was applied in an unconstitutionally vague, overbroad and amibiguous manner. The Godfrey Court noted that it previously had said that subsection (b)(7) was vague on its face but there was "no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction" of the statutory provision. Gregg v. Georgia, 428 U.S. 113, 201 (1976). In Godfrey, this Court concluded that the Georgia Supreme Court had in fact placed a narrowing gloss on the statute and that such a reading made the aggravating circumstance constitutionally acceptable. 446 U.S. at 431. But because in Godfrey's case the Georgia Supreme Court

failed to apply its limiting construction of the (b)(7) aggravating circumstance, this Court vacated the death sentence. This Court has thus recognized that in evaluating state procedures designed to meet the mandates of the Eighth Amendment, the line between "federal law" and "state law" is at times difficult to discern.

Similarly, if Florida's override is constitutional, it is so only by virtue of Tedder. In the present case, however, Tedder was not followed. The lower courts failed to follow the Tedder standard in overriding and in approval of that override by omission of any consideration of the reasonableness of the jury's life verdict. Neither the state trial judge who overrode the jury nor the Florida Supreme Court that affirmed the sentence found that "virtually no reasonable person could differ" over the necessity of the death penalty in this case. Instead the courts simply found that there were facts that supported the imposition of death. By ignoring the reasonable basis for the jury's verdict, the Florida Supreme Court has inconsistently applied its jury override standards, resulting in such a vague and overbroad construction so as to violate settled constitutional precepts. The jury's life verdict in this case was reasonable, and hence the imposition of death, over that reasonable jury verdict, violated the Eighth Amendment. As Petitioner demonstrates below, reasonable persons could and did differ over whether DAN EDWARD ROUTLY should live or die.

B. The Jury's Sentencing Verdict of Life Imprisonment was Reasonable

A review of the evidence presented at trial and at the advisory sentencing proceeding reflects that the jury verdict of life imprisonment was reasonable. Actually such a decision is subjective and therefore incapable of precise definition. But the circumstances of this homicide were not so heinous that reasonable men would conclude that only death was the appropriate punishment.

A factor which may well have been significant to the jury is the fact that most of the evidence of the accompanying felonies argued in support of aggravation were derived solely from the

Petitioner's tape recorded confession and were not corroborated by other evidence.[3] It is reasonable to assume that the jury intuitively adopted the evidentary rule which requires extrinsic evidence of corpis delecti prior to admission of a confession and therefore treated the accompanying felonies and the allegation that the felony was committed for pecuniary gain as a single aggravating circumstance.

The other aggravating circumstances were simply not proven beyond a reasonable doubt. For example, that the homicide was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody was not supported by any evidence presented at trial and the jury may well have declined to engage in the kind of speculation necessary to find that aggravating circumstance.[4] Similarly, that the homicide was especially heinous, atrocious or cruel and/or was committed in a cold, calculated and premeditated manner, required a subjective judgment which the jury may have reasonably declined to make.

Although the judge found no mitigating circumstances with which to outweigh the aggravating circumstances in making his sentencing decision, evidence of several mitigating circumstances was presented and argued at trial and may well have been considered by the jury.

C. Conclusion: The Jury, Not the Judge Acted Reasonably and Constitutionally

The sentencing judge's decision to override the jury's recommendation must have been grounded upon an improper weighing

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[3] At Petitioner's sentencing the court found five aggravating circumstances and no mitigating circumstances. The five aggravating circumstances found were: (1) that the capital felony was committed while the defendant was engaged in the commission of a robbery, rape, arson, burglary, or kidnapping...(2) that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody...(3) that the capital felony was committed for pecuniary gain...(4) that the capital felony was especially heinous, atrocious or cruel...(5) that the capital felony was a homicide committed in a cold, calculated and premeditated manner.

[4] In Routly v. State, supra, Justice McDonald, writing in a concurring opinion, declined to find sufficient evidence of this aggravating circumstance. According to Justice McDonald "[the] circumstances are subject to many hypothesis on why this homicide was perpetrated..." p. 1266.

of aggravating and mitigating circumstances and his consideration of the presentence investigation report. Nothing else explains the verdict in that the presentence investigation report was the only thing which differentiated the judge's consideration from that of the jury.

It is significant that neither the Florida Supreme Court nor the trial court, in affirming Petitioner's death sentence, made the finding required by Tedder v. State, that virtually no reasonable person could differ over the necessity of a death sentence. The Florida Supreme Court held that:

> We have compared, as did the trial court, the facts in the case sub judice with cases where we have upheld the imposition of the death penalty on similar facts and found the sentence imposed to be consistent with those cases. (citations omitted).

This "proportionality test" is quite different from that of Tedder and suggests that either the court has impliedly overruled the Tedder decision or that the Florida courts were aware that the Tedder test was not met in this case.

IV. A TRIAL JUDGE'S OVERRIDING A JURY'S FACTUALLY BASED DECISION AGAINST THE DEATH PENALTY MUST, IN ALL CASES, VIOLATE THE FIFTH, SEVENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner argued above that the jury override was unconstitutionally applied in this case. But the difficulties in defining and administering the override, brought sharply into focus by Petitioner's case, lead inevitably to a broader inquiry: is the override itself constitutional? Petitioner readily acknowledges that this Court has suggested that the override is constitutional. At least one lower court has read Proffitt, Dobbert and Barclay as foreclosing the matter. See Douglas v. Wainwright, _____F.2d _____ (11th Cir. 1983). It is for that reason that only this Court can revisit the issue.

Petitioner respectfully asks this Court to reconsider the issue. Florida's jury override should be declared unconstitutional on its face for at least four reasons: the nature of the death decision, based as it is on retributive impulses, can only be imposed by a cross-section of the community whose outrage is being expressed; for this reason, judges have no special expertise and in fact juries are the true "experts" on whether death is appropriate in any given case; the practice of overturning a jury's penalty determination is contrary to the overwhelming national practice since at least 1948, it is also contrary to the great weight of professional legal opinion.

Because Florida has chosen to involve a jury in deciding who dies, the life verdict of that jury should stand.

A. The Nature of the Decision on Death

Death is different, this Court has stated, for several reasons. Not only is this penalty irremediable, but the motive for its imposition differs from any other penalty permissible under our Constitution. Rehabilitation is irrelevant and incapacitation, while conceptually applicable, has never been emphasized as a goal of the death penalty. Deterrence is a matter if great importance to legislatures debating whether the death penalty is appropriate at all, but not to particular juries deliberating whether the penalty should be imposed in a given case. Retribution, Petitioner would assert, is the primary goal

of execution. This Court has recognized again and again that the death penalty represents a statement our society makes about the kind of people we are. An execution is a public testament of revulsion. See Furman v. Georgia, 408 U.S. at 453 (Powell, J., dissenting); Gregg v. Georgia, 428 U.S. at 184.

Because the death decision is a retributive one and because retribution is an expression of the will of the "community", a greater degree of reliability is achieved if the will of that body is expressed and followed. The kind of reliability discussed by this Court is cases such as Lockett v. Ohio, 438 U.S. 586, 604, 605 (1978) refers to the accuracy of the decision to be retributive. A jury is substantially better able to convey the community's wish for retribution than is a single judge. The role of the jury in capital sentencing is to "maintain a link between contemporary community values and the penal system" that reflects the "evolving standards of decency that mark the progress of a maturing society". Witherspoon v. Illinois, 391 U.S. 510, 519 n. 15 (1968). The Court's reference to this "link" is another way of saying that the jury's job is to speak the community's desire for retribution. And that is a job that only a jury can perform.

B. The Myth of Judicial Expertise in Capital Sentencing

One may accept the general proposition that jury sentencing is required to ascertain the "conscience of the community" and still argue that judicial sentencing is needed to foster consistency among cases. This Court in Proffitt v. Florida observed that "judicial sentencing should lead to greater consistency ... since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." 428 U.S. at 252. Petitioner respectfully submits that this proposition is an inaccurate statement of the nature of the capital sentencing decision.

There is no way for a judge to equal what a jury can best bring to the capital sentencing process -- the community's view. Juries, properly chosen in accordance with law designed to assure that they reflect a fair cross-section of the community, are more

likely to accurately reflect community values than are individual trial judges. This is true because twelve people are more likely than one person to reflect public sentiment, because jurors are selected in a manner enhacing that likelihood and because judges collectively do not represent -- by race, sex or economic or social status -- the communities from which they come. This is the touchstone of the retributive impulse and in this it is the jury, not the judge, which has the "expertise."

Further, this Court's concern with "individualization", expressed in Lockett renders questionable the theoretical relevance of "analogous" cases at the jury sentencing stage. Lockett emphasizes the differences between people, their "uniqueness", 438 U.S. at 605, when it comes to capital sentencing.

Finally, consistency among cases need not occur at the judge-jury stage of the process. Consistency can and must be provided though the appellate review procedures approved by this Court in Proffitt. To the extent that different trial judges sentence similar defendants, they will predictably apply different standards in capital cases, just as they do now in noncapital cases.

C. National Practice

In testing the constitutional validity of death penalty procedures, this Court has often looked to the national legislative practice. See, e.g. Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Coker v. Georgia, 433 U.S. 584, 593-597 (1977); Beck v. Alabama, 447 U.S. 625 635-637 (1980). Such examination in this case reveals that the practice of overturning a jury's penalty determination is contrary to the overwhelming national practice since at least 1948, thus violating the "evolving standards of decency" identified by this Court in Gregg v. Georgia and Gardner v. Florida, 430 U.S. 349 (1977). Such overwhelming national rejection of a procedure for imposing the ultimate penalty must at the very least raise serious doubts about its constitutionality.

In 1948, only New York, Delaware and Utah sanctioned the practice of jury override, out of 42 jurisdictions (including

federal) with discretionary capital punishment for murder.[5] By the time of Furman in 1972 only Delaware and Utah permitted such a procedure out of 41 capital murder jurisdictions (including federal and District of Columbia),[6] New York having made a mercy decision by either the judge or the jury binding in 1963.[7]

Since the decision in Furman, of the 32 jurisdictions (including federal) which have adopted "guided discretion" death penalty statutes with jury participation in the penalty phase, only Florida, Indiana and Alabama permit death sentences after jury decisions for life (see Appendix D). Moreover, only in Florida does it appear that such death sentences have actually been imposed and affirmed since Furman. As of May, 1981, no death sentences after jury life determinations had been imposed under the Indiana or Alabama statutes.

An additional indicator of unconstitutionality is the great rarity with which death sentences after jury mercy recommendations were actually imposed and executed under the pre-Furman Utah and New York laws. (There were no executions in Delaware after 1949). All seven Utah executions during the period of 1948-1972 involved cases where the jury had refused to recommend life imprisonment; in two cases death sentences were affirmed by the Utah Supreme Court after jury life recommendations, but the defendants received executive clemency (see Appendix E for Utah cases). Commentators have also observed that under the pre-1963 New York law, trial judges almost "invaribly" followed jury recommendations of mercy. See Togman, The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964), citing New York District Attorney's Association, Memorandum and Draft Bill (October 17, 1960).

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5 See Andres v. United States, 333 U.S. 740, 767 (1948) (Frankfurter, J., concurring). Inadvertently, Justice Frankfurter listed New York as binding and New Mexico as nonbinding, but see New Mexico Acts of 1939, Ch. 49 (jury recommendation of life imprisonment in capital case binding).

6 See Witherspoon v. Illinois, 391 U.S. 510, 525-527 and nn. 2-8 (1968) (Douglas, J., concurring). Both Utah and Delaware now make life imprisonment automatic unless the jury unanimously agrees on death. (See Appendix D).

7 See People v. Fitzpatrick, 308 N.Y.S.2d 18, 22 (1970).

Thus, at least since 1948, death sentences after jury decisions for life have been rare in legislative practice and yet rarer in application. This indication of unconstitutionality must be given great weight.

D. Professional Legal Opinion

This near-uniform consensus of the States that jury decisions against the death penalty should be final is in accord with professional legal opinion, another factor to be considered in due process questions concerning jury and death penalty practices.[8]

While this Court in Proffitt, 428 U.S. at 252 n. 10, cited sources to show that trial judges can play a useful role in capital sentencing, it did not appear to attempt to ascertain professional opinion on the imposition of a death sentence after a jury decision for life. Surveying the literature both before and after Furman, Petitioner finds considerable agreement that jury participation is undesirable in noncapital sentencing but highly desirable if not constitutionally mandated in deciding life or death; that if a jury takes part in the penalty phase of a capital case, its verdict for life must be final; but a jury's decision for death may best be treated as a mere recommendation to the court.

A major study endorsed by this Court in Duncan v. Louisiana, 391 U.S. 145 (1968), found a reasonable basis for judge/jury disagreements in capital penalty decisions.[9] This pattern holds true in Florida. (See Appendix F). Further, even severe critics of noncapital jury sentencing have advocated the jury's power to reject the death penalty.[10]

Special attention is called to the two sources directly cited by this Court in Proffitt, 428 U.S. 252 n. 109, which note

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See e.g. Gregg v. Georgia, supra, 428 U.S. at 189-195.

H. Kalven and H. Zeisel, The American Jury 445 (1966), cited in Duncan 391 U.S. at 157 and nn. 24 & 26.

See e.g., Note, Jury Sentencing in Virginia , 53 Va. L. Rev. 968, 969 (1967); Rubin, The Law of Criminal Correction 375 (1973). LaFont, Assessment of Punishment--A Judge or Jury Function, 38 Texas L. Rev. 834, 838 (1960); Report on the Royal Commission on Capital Punishment, 1949-1953, ¶571.

with approval the prevailing practice of requiring a jury's consent for the death sentence but leaving noncapital sentencing to experienced judges alone.[11]

Since the 1976 death penalty decisions, some commentators have concluded that jury participation and consent in a death sentence (unless waived) is constitutionally required,[12] although it is not necessary to reach this broader issue in order to prohibit overturning a jury's life determination. Several sources, including the Model Penal Code, endorse a system where the trial judge is the final sentencer (as in Florida), but an advisory jury's decision against death is final.[13] One commentator comparing several post-Furman systems generally endorses Florida's statute and case law, but disapproves of the tension created between judge and jury when a jury's decision for life can be overruled.[14]

E. Conclusion

This Court should grant certiorari to reconsider whether a state legislature may involve a jury in a capital punishment

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11 See American Bar Association Project on Standards for Criminal Sentencing, Sentencing Alternatives and Procedures, §1.1, Commentary (Approved Draft 1968) 47-48 (reasons for giving requiring jury consent for death penalty); President's Commission on Law Enforcement and Administration of Justice: The Challenge of Crime in a Free Society Task Force report, The Courts 26 (capital jury discretion generally accepted, but noncapital jury sentencing undesirable).

12 See Liebman and Shepard, Guiding Capital Sentencing Discretion Beyond the "Boiler Plate:" Mental Disorder as a Mitigating Factor, 66 Geo.L.J. 757, 819 n. 273 (1978) (jury is appropriate, if not constitutionally mandated, capital sentencing forum); Mannheim, The Capital Punishment Cases: A Criticism of Judicial Method, 12 Loy.L. Rev. 85, 107-108, 131 (1978) (suggests requirement of jury consent for death in penalty phase under the Constitution); Gillers, Deciding Who Dies, 129 U. Penn. L. Rev. 1, 39-74 (1980) (jury consent for death constitutionally required).

13 American Law Institute, Model Penal Code 210.6 and Commentary at 133 (Prop. Off. Draft 1962); Togman, supra, 39 N.Y.U.L. Rev. 50, 53; Wollan, The Death Penalty After Furman, 1974 Crim. Justice Systems Rev. 213, 230; Symposium on Capital Punishment, 7 N.Y.L. Forum 249, 312-313 (1961) (opinion of Prof. Louis B. Schwartz); Comment, Jury Discretion and the Unitary Trial Procedure in Capital Cases, 26 Ark. L. Rev. 33, 52-53 (1972).

14 Shapiro, First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana, 24 Loy. L. Rev. 709, 736, 743-747 (1978).

trial similar to a trial on guilt or innocence and then treat a finding in favor of the accused as merely advisory. Because the capital decision hinges upon retribution, only a jury can decide who dies. For this reason, virtually every State in the Nation makes jury verdicts for life binding. Florida's system of jury override is unconstitutional.

CONCLUSION

Upon the foregoing reasons, the Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

By: RAYMOND L. GOODMAN
112 South Lake Avenue
Orlando, Florida 32801
(305) 423-2100

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing had been furnished this 12th day of March, 1984, by mail delivery to Richard W. Prospect, Assistant Attorney General, 125 North Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014.

RAYMOND L. GOODMAN

IN THE SUPREME COURT OF THE UNITED STATES

DAN EDWARD ROUTLY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

83-6405

ORIGINAL

CASE NO. A-610

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DAN EDWARD ROUTLY, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

I

Whether a conviction for first degree murder obtained by introduction of a tape recorded confession made in exchange for a promise to charge the lesser offense of second degree murder denies due process of law and abridges rights guaranteed by the 5th Amendment to the United States Constitution?

II

Whether a death sentence imposed over a jury recommendation of life which is based on a presentence investigation report containing non-statutory aggravating circumstances from anonymous sources denies due process of law and subjects Defendant to cruel and unusual punishment?

III

Whether a death sentence imposed over a factually based jury recommendation of life subjects Defendant to cruel and unusual punishment in all cases?

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

NONE

3. Do you own any cash or checking or savings account?

NONE

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

NONE

5. List the persons who are dependant upon you for support and state your relationship to those persons.

NONE

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Dan E. Routly
DAN EDWARD ROUTLY

STATE OF FLORIDA)
COUNTY OF Bradford)

Subscribed and sworn to before me this 8 day of March, 1984.

My commission expires:

Bennie Hannigle
Notary Public
NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Sept. 25, 1987

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Associate Justice of the Supreme
Court of the United States

No. A-610

83-6405

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ORIGINAL

DAN EDWARD ROUTLY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RAYMOND L. GOODMAN
112 South Lake Avenue
Orlando, Florida 32801
(305) 423-2100

Attorney for Petitioner

ing in the building as well as the neighbors, firefighters, and police responding to the call. In each instance, we sustained the trial court's finding that defendant created a great risk of death to many persons.

In the case *sub judice* the struggle with the victim was clearly conduct surrounding the capital felony. There were numerous vehicles on the highway and defendant should have reasonably foreseen that his erratic driving and possible loss of control of the car would have created a "great risk" of danger to many persons, including the risk of crashes, possible harm to neighbors, and to police responding to the scene.

The evidence fully supports the finding that the murder occurred while defendant was engaged in commission of a kidnapping, robbery, and rape. The victim was abducted at knife-point from the laundromat and taken by defendant in his car. Although she was wearing a red top when she left for the laundry, she only had shorts on when her body was recovered. Defendant also took the victim's pocketbook and buried it. This evidence is insufficient to support the finding that the felony was committed for pecuniary gain.

[34] Evidence of the victim's kidnapping, her struggle, her pleas for help, and the extremely cruel beating and strangulation death supports the finding that the murder was extremely cruel, heinous, and atrocious.

The court considered defendant's contention that he was acting under extreme emotional duress and properly rejected it, as did all three psychiatrists who examined defendant.

[35] Before imposing sentence, the trial judge visited Florida State Prison to determine if defendant's conduct on death row constituted a mitigating circumstance. Defendant says this violates the principles of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It does. However, as the result of this investigation the trial judge found a non-statutory mitigating factor which he considered in imposing sentence. This error did not injuriously affect the substantial rights of the defendant.

The facts supporting the sentence of death are clear and convincing and are established beyond a reasonable doubt. We have carefully examined the record in this case and considered the brief of the defendant. Defendant has had a fair trial and other questions presented by him in the brief are without merit.

It is therefore our opinion the judgment and sentence should be affirmed.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and EHRLICH, JJ., concur.

Dan Edward ROUTLY, Appellant,

v.

STATE of Florida, Appellee.

No. 60066.

Supreme Court of Florida.

Sept. 22, 1983.

Rehearing Denied Dec. 12, 1983.

Defendant was convicted in the Circuit Court, Marion County, Carven D. Angel, J., of first-degree murder, and he appealed. The Supreme Court, Adkins, J., held that: (1) defendant's tape-recorded confession which he gave to Florida officers shortly after his arrest in Michigan was not subject to being suppressed on ground that defendant was arrested on information that fell below standard of probable cause; (2) unavailability of an eyewitness was unforeseeable and, hence, was a basis for a justifiable extension of speedy trial rule; and (3) aggravating factors that homicide was committed while defendant was engaged in a

kidnapping, was committed for purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, was committed for pecuniary gain, and was especially heinous, atrocious, or cruel were established by evidence and justified imposition of death penalty in absence of any mitigating factors.

Affirmed.

McDonald, J., concurred in result only on sentence and filed opinion.

1. Criminal Law ⇐1043(2)

Failure of defendant to make a contemporaneous specific objection at trial operated to preclude defendant from raising point on appeal that trial court erred in failing to suppress his tape-recorded confession which he gave to Florida officers shortly after his arrest in Michigan.

2. Arrest ⇐63.4(11)
Criminal Law ⇐519(8)

Mere fact that arresting officer was not privy to statement of defendant's girl friend, an eyewitness to murder, given to other officers and implicating defendant in crime did not render arrest unlawful for lack of probable cause and, hence, did not require suppression of tape-recorded confession which defendant gave to police officers shortly after his arrest.

3. Criminal Law ⇐517(7)

Legal conclusion of police officer that he arrested defendant because he was wanted for questioning in regards to a murder did not prevent State from arguing and presenting evidence that there was probable cause for defendant's arrest and, hence, did not preclude admission of tape-recorded confession which defendant gave to police officer shortly after his arrest.

4. Criminal Law ⇐519(6)

Tape-recorded murder confession which defendant gave to Florida officers shortly after his arrest in Michigan was not subject to being suppressed regardless of whether defendant was arrested for murder on information that fell below standard of probable cause, where authorities in Michigan had outstanding warrants for defendant on unrelated charges.

5. Criminal Law ⇐520(1)

Claim that defendant's confession was not voluntarily given, having been induced by various promises made by police officers, was not supported by facts in record, despite factual dispute between testimony of officers and defendant.

6. Criminal Law ⇐577.13

The unforeseeable unavailability of a witness is a ground for an extension of a speedy trial rule. West's F.S.A. RCrP Rule 3.191.

7. Criminal Law ⇐577.13

Determination by trial court of exceptional circumstances justifying an extension of speedy trial rule is a matter of discretion based on facts presented below. West's F.S.A. RCrP Rule 3.191.

8. Criminal Law ⇐577.13

Unavailability of an eyewitness who was in Michigan was unforeseeable and, hence, was an exceptional circumstance justifying an extension of speedy trial rule where witness was in her penultimate month of pregnancy and evidently experiencing unusual cramps which cautioned against her travel. West's F.S.A. RCrP Rule 3.191.

9. Burglary ⇐2

The burglary statute is satisfied when the defendant "remains in" a structure with the intent to commit an offense therein and, hence, does not require proof of an unlawful entry. West's F.S.A. §§ 810.02(1), 812.13(1), 921.141(5)(e).

10. Homicide ⇐354

Burglary committed by defendant at the time of fatal event was an aggravating circumstance justifying imposition of death penalty in homicide case, notwithstanding claim that defendant legally entered home from outset, where defendant remained in structure with intent to commit an offense therein. West's F.S.A. §§ 810.02(1), 812.13(1), 921.141(5)(e).

11. Homicide ⇐354

Evidence was strong enough to justify imposition of death penalty on basis of aggravating circumstance that capital felony was committed for purpose of avoiding or preventing a lawful arrest or effecting an escape from custody in that defendant, who knew that victim knew him and could later provide police with his identity, had no logical reason for binding and kidnapping him and driving him to a secluded area except for purpose of murdering him to prevent detection. West's F.S.A. §§ 810.02(1), 812.13(1), 921.141(5)(e).

12. Criminal Law ⇐1208.1(5)

Imposition of death penalty on basis of aggravating circumstance that capital felony was committed for pecuniary gain was not improper due to doubling of aggravating factors of robbery and pecuniary gain in that defendant also committed a kidnapping which sufficed as a single aggravating factor. West's F.S.A. § 921.141(5)(f).

13. Homicide ⇐354

Imposition of death penalty on basis of aggravating factor that capital felony was especially heinous, atrocious, or cruel was not improper in situation where victim was murdered by gunshot and may have died instantaneously; the victim knew that he was going to die, and the terror that was felt by the victim during the ride in the trunk of the defendant's vehicle, and immediately precedent to death, was beyond description by the written word. West's F.S.A. § 921.141(5)(h).

14. Homicide ⇐354

The cold, calculated and premeditated manner in which the murder is committed is applicable as an aggravating circumstance to imposition of death penalty in cases where murders are executions or contract murders. West's F.S.A. § 921.141(5)(i).

15. Homicide ⇐354

Imposition of death penalty on basis of aggravating circumstance that murder was cold, calculated and premeditated, as indicated by purchase of firearm, among other things, was not improper, even though defendant did not even know victim when firearm was purchased, where murder could properly be characterized as an execution. West's F.S.A. § 921.141(5)(i).

16. Homicide ⇐354

Based on observations of defendant at trial, presentence investigation, psychiatric evaluation, and facts of crime, trial court was not required to find that defendant's age of 25 at time of homicide was a mitigating factor precluding imposition of death penalty. West's F.S.A. § 921.141(5)(a, b).

17. Criminal Law ⇐1208.1(5)

There was no basis in record for finding as a mitigating circumstance precluding imposition of death penalty that defendant lacked a significant criminal history or that defendant was under the influence of extreme mental or emotional disturbance. West's F.S.A. § 921.141(5)(a, b).

18. Homicide ⇐354

Disparate treatment of an eyewitness, who received immunity, was not a nonstatutory mitigating circumstance precluding imposition of death penalty in homicide case in that eyewitness was not an accomplice.

Raymond L. Goodman, Orlando, for appellant.

Jim Smith, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Daytona Beach, for appellee.

ADKINS, Justice.

This is an appeal by Dan Edward Routly from his conviction of first-degree murder and from the trial judge's imposition of the death sentence after the jury had recommended life imprisonment. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We affirm the conviction and the sentence.

In mid-1979 defendant and his girlfriend, Colleen O'Brien, were travelling throughout Florida looking for work. They settled temporarily in the Ocala area when defendant was offered employment. Defendant and O'Brien stayed at several locations during their term of residence in the area.

First, they resided in a trailer which belonged to defendant's employer. After defendant's employment was terminated, they lived in a friend's garage apartment for a short term. Thereafter, they resided briefly at a campground.

During this period of time, defendant and Ms. O'Brien were apparently having domestic difficulties which resulted, at one point, in O'Brien leaving defendant. For some reason O'Brien accepted a ride from the victim, Anthony Bockini, a retired resident of the community. Bockini dropped O'Brien off at the campground and gave her his name, address, and phone number with instructions for her to call if she needed help.

Apparently unable to resolve the dispute with defendant, O'Brien called Bockini the next day and requested that he come and pick her up. Bockini complied and O'Brien stayed overnight, during which time she began making preparations to take a bus back to Michigan.

The following evening the defendant went to Bockini's house in an attempt to reconcile with O'Brien. Bockini was not at home at the time, and O'Brien let the defendant into the house. When Bockini later returned, defendant feigned a departure out the back door, but subsequently converged on the victim wielding a gun and demanded him to lie on the bed. Defendant then bound (hands and feet) and gagged the victim and ransacked his home looking for money and valuables. Defendant broke ceramic banks on the floor pilfering the contents, and took the money from the victim's wallet.

Next, the defendant loaded the victim into the trunk of his (victim's) car, told O'Brien to pack her belongings and they set out on a journey purportedly looking for a "field to let him out in." While defendant was looking for an appropriate place to discharge the victim, the tail lights on the vehicle began to malfunction. Defendant drove a short distance further until he found an appropriate place to stop. He pulled off the road, took the victim out of the trunk, shot the victim three times and dragged him up under some bushes.

The partially decomposed body of the victim was discovered sometime later by a person plowing the field. Defendant and O'Brien drove to Louisiana where he washed the car and abandoned it, keys in the ignition (hoping someone would steal it).

Later that year, O'Brien was arrested by authorities in Flint, Michigan. While in custody, she informed the Flint authorities of the murder and implicated defendant. Officers from Marion County, Florida, were notified and traveled to Michigan where they interviewed O'Brien, and, with the assistance of Flint authorities, arrested defendant.

Defendant waived extradition; he was indicted by a Marion County Grand Jury, tried and convicted of first-degree murder.

As his first point on appeal, defendant argues that the trial court erred in failing to suppress his tape-recorded confession which he gave to the Florida officers shortly after his arrest in Michigan. Defendant's first contention on this issue is that his confession was the fruit of an unlawful arrest. To support this contention defendant quotes the testimony of Officer Black, a uniformed police officer from Flint, who was directed by superiors to stop and arrest the defendant. Black testified that he arrested the defendant because "he was wanted for questioning in regards to a murder from Florida." Although the defendant cites no authority for his position, he seems to assert that the state is bound by the legal conclusion as articulated by the Michigan officer on cross-examination, and that we should infer from this testimony that the defendant was arrested on information that fell below the standard of probable cause.

[1-3] At the outset and dispositive on this issue is the fact that the defendant failed to make a contemporaneous specific objection at trial. Not having done so, he cannot now raise this issue on appeal. *Steinhorst v. State*, 412 So.2d 332, 338 (Fla. 1982); *Jones v. State*, 360 So.2d 1293, 1296

(Fla. 3d DCA 1978). Further, even had the argument been properly preserved, the record indicates that the officers did in fact have probable cause to arrest the defendant for murder. The officers had previously taken a statement from defendant's girlfriend, an eyewitness to the murder, who implicated the defendant as the perpetrator. The mere fact that Officer Black was not privy to this statement would not render the arrest unlawful. Nor would the legal conclusion of the officer prevent the state from arguing and presenting evidence that probable cause did in fact exist.

[4] We note further that there is also evidence in the record that the Michigan authorities had outstanding warrants for the defendant on unrelated charges. Therefore, even had he preserved this argument, we would hold it to be without merit.

[5] The defendant next asserts that the confession was not voluntarily given, having been induced by various promises made by the officers. Defendant relies on a factual dispute between the testimony of the officers and himself. These issues have been resolved by the fact-finder in favor of the state, and we find nothing in the record that supports a reversal on this issue.

As his second point of error, defendant alleges that the trial court erred in failing to grant the defendant's motion for discharge based on a violation of Fla.R.Crim.P. 3.191 (speedy trial). The defendant was arrested on December 5, 1979. On May 20, 1980, the trial court issued a written order granting an extension of time under the speedy trial rule. In his order, the court stated that Colleen O'Brien, a resident of Michigan, and the only eyewitness to the murder, was incapacitated as a result of her "*unexpected* medical condition *and* the late stage of her pregnancy," and that her "presence or testimony is *uniquely* necessary for a full and adequate trial." (Emphasis supplied). The trial commenced on July 14, 1980, seven months after the defendant was arrested and within the period of the extension.

Defendant argues that the witness' condition was not unexpected because the state was aware of her pregnancy from the outset, and the opportunity to go to trial on an earlier date was within the state's discretion. The defendant asserts that he was at all times prepared for trial, although he did not file a formal demand, and that the state should have foreseen the delivery as the natural consequence of pregnancy and provided for an earlier trial.

The hearing for the motion took place on April 15, 1980, at which time the assistant state attorney presented the factual basis for exceptional circumstances to the court below. These facts, as set forth in the record, indicate that the witness' estimated delivery date was one and one/half months away, but that she was experiencing cramps and had been advised by her doctor that travelling could be hazardous. Based on this evidence, the trial court found that Fla.R.Crim.P. 3.191(f)(1) (unforeseeable absence of person who is uniquely necessary), was applicable.

[6, 7] That the unforeseeable unavailability of a witness is grounds for an extension of the speedy trial rule is clear. Fla.R.Crim.P. 3.191(f); *Dedmon v. State*, 400 So.2d 1042, 1045 (Fla. 1st DCA 1981); *Foster v. State*, 380 So.2d 1081, 1082–83 (Fla. 3d DCA), *review denied*, 388 So.2d 1113 (Fla.1980); *State v. Rheinsmith*, 362 So.2d 698, 699 (Fla. 2d DCA 1978); *State v. Wolfe*, 271 So.2d 203, 204 (Fla. 4th DCA 1972). Further, the trial court's determination of exceptional circumstances is a matter of discretion based on the facts presented below. *Talton v. State* 362 So.2d 686, 687 (Fla. 4th DCA 1978), *cert. denied*, 370 So.2d 462 (Fla.1979).

[8] The only question in dispute was the foreseeability of the witness' unavailability for trial. The trial court found that the unavailability was unforeseeable; we believe that the record supports this finding. The witness was in her penultimate month of pregnancy and evidently experiencing unusual cramps which cautioned against her travel. We find no abuse of discretion.

We have considered other purported procedural errors asserted by the defendant and find them to be without merit. We have also reviewed the evidence pursuant to Florida Rule of Appellate Procedure 9.140(f), and we conclude that no new trial is required.

Defendant's next arguments concern the imposition of death by the trial court, despite the jury recommendation of life. The trial court in his written findings of fact pursuant to section 921.141(3), Florida Statutes (1981), found five aggravating circumstances applicable.

The first aggravating circumstance applicable was section 921.141(5)(d) (the capital felony was committed while the defendant was engaged in the commission of a robbery, rape, arson, burglary, kidnapping, etc.). In support of his conclusion, the court made the following factual findings:

> The Defendant entered the home of Anthony Francesco Bockini after dark, Sunday evening, June 17, 1979, when the victim was not at home. The entering was without any legal right or authority and was with the intent to commit theft and therefore amounted to burglary. Anthony Francesco Bockini was retired, a widower who lived at home alone and devoted his retirement years to volunteer community service. On June 17, 1979, after working as a volunteer in a community hospital, he had dinner with friends, a retired attorney and his wife. He left their house and went home, still wearing a volunteer hospital uniform. When he went into the bedroom to change, the Defendant came in from the back room, pulled a gun on him, told him to lay down on the bed, tied him up, and went through his house looking for some money. He found ceramic banks in a drawer, broke them on the floor, and took the change. He took a couple of dollars from the victim's wallet. He went through the house and picked up some radios and things that he could get rid of for gas. He tied the victim's hands and feet, gagged him with a bandana and carried him outside and put him in the trunk of his own car. He drove north of Ocala down back roads and took the old two lane road to Reddick.
>
> The court concluded from these facts that the defendant committed the homicide while engaged in a kidnapping and while fleeing from the previously committed burglary.

[9, 10] The defendant argues that the findings of fact do not support the conclusion that he committed a burglary, since the record indicates that defendant legally entered the home from the outset. This argument is without merit. The burglary statute is satisfied when the defendant "remains in" a structure with the intent to commit an offense therein. Hence, the unlawful entry is not a requisite element. § 810.02(1), Fla.Stat. (1981). Further, the record would support a finding that the defendant also committed a robbery. § 812.13(1), Fla.Stat. (1981). And, even had the requisite elements for robbery and burglary not been present, the defendant concedes his commission of a kidnapping; therefore, the other offenses are mere surplusage.

The court below also found as applicable section 921.141(5)(e) (the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody). The trial court bases this conclusion on the following facts:

> In driving out of Ocala on back roads towards Reddick the Defendant looked for a side street where there weren't many cars and looked for a field away from houses where he could put the victim out. He took the victim out of the trunk, shot him three (3) times and dragged him back under some bushes. The Defendant's girlfriend, Colleen O'Brien, was with him continuously from inside the victim's house up to the murder. After the murder, the Defendant took Colleen back to their residence in Ocala and picked up the Defendant's other girlfriend, Mary Avery, and her daughter, by the Defendant, and drove to Tallahassee where he put Mary on a bus back to Miami. He told Mary he shot some-

body and she was scared. He and Colleen drove on to some city in Louisiana. There, he took the car to a car wash, washed it all down in the trunk and cleaned the inside out to get the fingerprints out. He parked the car at a bar and left the keys in it, hoping somebody would take it. Later he told his brother he shot somebody. Except for his brother, Colleen and Mary, no one learned of the murder through the Defendant.

Colleen O'Brien testified at trial. It is impossible to communicate verbally through the cold record the non-verbal testimony through her demeanor on the witness stand. Her demeanor portrayed total domination by the Defendant.

By killing the victim, the Defendant eliminated the only witness who would apparently testify against him as to the burglary and theft of the victim's property, cash and automobile.

The defendant argues that the evidence is insufficient to find this aggravating fact is applicable beyond a reasonable doubt. In support of this argument, defendant cites *Riley v. State*, 366 So.2d 19 (Fla.1978), *cert. denied*, — U.S. —, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982). This case, however, does not support the defendant's position. In *Riley*, the defendant shot and killed the victim during a robbery. The victim, who knew the defendant, was bound and gagged after one of the perpetrators expressed a concern over possible subsequent identification. We held that the trial court properly applied this aggravating factor. We said that this aggravating factor is broad enough to encompass the situations where a defendant murders the witness to a crime. We issued a caveat, however, against the mechanical application of this factor whenever a death occurs: "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases." *Id.* at 22.

[11] We believe that the evidence in the instant case as interpreted by the fact-finder is strong enough to comply with the *Riley* caveat. We have upheld this finding in numerous cases under facts not unlike the case *sub judice*. *See e.g., Bolender v. State*, 422 So.2d 833 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983) (defendants robbed victims of drugs, held them for hours and tortured them to death and near death, then disposed the bodies by setting on fire the vehicle containing their bodies. Defendant's intent in killing the victims was partially to prevent victims from identifying defendants); *Martin v. State*, 420 So.2d 583 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1508, 75 L.Ed.2d 937 (1983) (defendants robbed the victim, a convenience store clerk, kidnapped her, raped her and drove her to a dump where she was stabbed to death and discarded); *Griffin v. State*, 414 So.2d 1025 (Fla.1982) (defendants abducted bystander to convenience store robbery and homicide, dragged him off into a wooded area, shot and killed him); *Adams v. State*, 412 So.2d 850 (Fla.), *cert. denied*, — U.S. —, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982) (defendant abducted an 8-year-old girl, sexually assaulted her, strangled her to death, encased the body in plastic and disposed of it in a desolate area); *Washington v. State*, 362 So.2d 658 (Fla.1978), *cert. denied*, 441 U.S. 937, 99 S.Ct. 2063, 60 L.Ed.2d 666 (1979) (robbery victims murdered). The facts in all of these cases were devoid of any evidence of an express statement by the defendant indicating their motives to kill the victims for the purpose of avoiding arrest. Therefore *Riley* cannot be distinguished on this basis and the decision supports the applicability of this factor in the instant case.

The defendant also asserts that our decision in *Menendez v. State*, 368 So.2d 1278 (Fla.1979), supports his position. In *Menendez* the defendant robbed a jewelry store and shot the proprietor using a silencer-equipped firearm. A customer happened onto the scene in time to see the defendant emptying the store safe. The customer provided a description to police which enabled them to effect an expeditious arrest. We held that the trial court there improperly applied this aggravating factor. We distinguished *Riley* as follows: "Here, unlike *Riley*, we do not know what events preceded

the actual killing; we only know that a weapon was brought to the scene which, if used, would minimize detection. We cannot assume Menendez's motive; the burden was on the state to prove it." *Id.* at 1282 (emphasis supplied).

The motive for the murder in *Menendez* could have been based on any number of reasons. For example, the victim may have resisted the robbery either physically or by attempting to attract attention. In the case *sub judice*, however, we know what transpired immediately prior to the murder. Therefore, the case at bar is like *Riley* and unlike *Menendez* in this respect. Although there is no express statement by the defendant that indicates the elimination of the eyewitness as his motive, the facts as found by the trial court support this finding. First, the defendant knew that the victim knew him and could later provide the police with his identity. Further, the defendant had no logical reason for binding the victim, kidnapping him and driving him to a secluded area except for the purpose of murdering him to prevent detection. In fact, defendant has not been able to assert any other explanation for this behavior in this appeal.

The trial court considered the fact that the defendant did not kill Ms. O'Brien, an eyewitness to the robbery kidnapping, in determining whether his motive was the elimination of witnesses. The court made the specific finding that O'Brien was so heavily under the influence of the defendant that he had no reason to fear that she would later report him. Therefore, this added fact does not weaken the finding that the defendant killed the victim to eliminate the witness to the robbery/kidnapping, and has no significance in the instant case. *See also Welty v. State*, 402 So.2d 1159 (Fla.1981).

[12] The defendant's next contention, that the application of section 921.141(5)(f) (capital felony was committed for pecuniary gain) was improper due to doubling of the aggravating factors of robbery and pecuniary gain under *Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977), is without merit. Here the defendant also committed a kidnapping and an improper doubling has not occurred. *Bolender v. State*, 422 So.2d 833 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 2111, 77 L.Ed.2d 315 (1983); *Stevens v. State*, 419 So.2d 1058 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983).

As his next point of error defendant asserts that the trial court improperly found as applicable section 921.141(5)(h) (that the capital felony was especially heinous, atrocious, or cruel). The trial court's findings of fact on this element are as follows:

> The victim was retired, a widower, who devoted his retirement years to community service. He lived at home alone. Upon returning home one Sunday evening, after working at the hospital followed by dinner with friends he was assaulted with a firearm in the sanctity of his home in his own bedroom, bound hand and foot, and gagged. Money was taken from his wallet from his person and ceramic banks were broken on the floor. He was physically carried out of his own house, thrown into the trunk of his own car, and driven out of town down back roads in the middle of the night. He most surely knew that he was going to die. He tried to escape by disconnecting the back lights to the car. He was taken to an isolated area, removed from the trunk and shot three times.

Citing *Cooper v. State*, 336 So.2d 1133 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), the defendant argues that the victim was killed in an instantaneous manner by gunshot which, he asserts, is not heinous, atrocious or cruel. *Cooper* is, however, inapposite. In that case, the defendant walked up to the victim, a deputy sheriff, and shot him twice in the head killing him *instantly*. *Id.* at 1136. We emphasized that the victim was killed "instantaneously and painlessly" in holding that the circumstances in that case did not constitute a killing which could be labelled heinous, atrocious or cruel. *Id.* at 1141.

Whether or not the victim in the instant case died instantaneously is unclear from the record. The medical examiner testified that, if her conclusions concerning the number of bullets and angle of the wound were correct, that "death would have been within a matter of a few minutes."

[13] However, we do not rely on this evidence to distinguish the instant case from *Cooper*. We have upheld the application of this factor where victims have been murdered by gunshot and have died instantaneously on several occasions in factual scenarios not unlike the case at bar. *See e.g. Smith v. State*, 424 So.2d 726 (Fla. 1982); *Griffin v. State*, 414 So.2d 1025 (Fla. 1982); *Steinhorst v. State*, 412 So.2d 332 (Fla.1982); *Adams v. State*, 412 So.2d 850 (Fla.1982), *cert. denied*, — U.S. ——, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); *White v. State*, 403 So.2d 331 (Fla.1981); *Knight v. State*, 338 So.2d 201 (Fla.1976). The common element in these cases is that, before the instantaneous death occurred, the victims were subjected to agony over the prospect that death was soon to occur. The trial court in his findings of fact concluded that the victim knew he was going to die; the evidence supports this conclusion. Mr. Bockini must have known that the defendant had only one reason for binding, gagging and kidnapping him. In a desperate effort to gain freedom, the victim apparently disconnected the vehicle tail lights. Having arrived in an isolated area, the victim was forcibly removed from the trunk and shot to death without the slightest mercy. The terror that was felt by the victim during this ride, and immediately precedent to his death is beyond description by the written word and is indistinguishable from the terror and fear felt by the victims in *Knight*, *Adams*, *Steinhorst*, *White*, and *Smith*. We therefore hold that the heinous, atrocious or cruel factor was properly applied by the court below.

The trial court also found section 921.-141(5)(i), Florida Statutes (1981) (cold, calculated and premeditated manner), to be applicable in this case. In support of this finding, the court stated the facts as follows:

> This crime was a homicide committed with a firearm which the Defendant purchased under false pretenses, using the name Keith Rosencrantz.... This fact, together with the other circumstances of this case, indicate that this capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification....

[14, 15] The defendant argues that there is insufficient evidence in the record to support this finding by the trial court; we disagree. Although we fail to see the relevance in the finding that the defendant purchased the weapon under "false pretenses", since the defendant did not even know the victim when the firearm was purchased. Nevertheless, the other circumstances of this case, considered by the trial court, are sufficient standing alone to support a finding of applicability of this factor. As we have previously stated, this factor applies in murders "which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." *McCray v. State*, 416 So.2d 804, 807 (Fla.1982) (citing *Jent v. State*, 408 So.2d 1024 (Fla.1981), *cert. denied*, 457 U.S. 1111, 102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982)). We find the execution style killing in the case *sub judice* to be without relevant distinctions from similar cases where we have affirmed the application of this factor. *See e.g. Smith v. State*, 424 So.2d 726 (Fla.1982) (convenience store clerk robbed, sexually battered and taken to a wooded area where she was shot three times in the head); *Combs v. State*, 403 So.2d 418 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982) (to facilitate a robbery, defendant lured the victim to a wooded area, under the pretext of it being a shortcut to a party, and thereafter shot her in the head several times).

Therefore, we hold that the trial court properly found five aggravating circumstances to be applicable, and turn to the

issue of mitigating circumstances of which the trial court found none to be applicable.

The defendant argues that the trial court should have found three mitigating factors applicable, the defendant's age, the defendant's lack of significant criminal history and that defendant was under the influence of extreme mental or emotional disturbance.

[16] With regard to the defendant's age as a mitigating factor, the court held, based on observations of the defendant at trial, the presentence investigation, the psychiatric evaluation and the facts in this crime, that the defendant's age of 25 at the time of the crime was not a mitigating factor in the instant case. We hold that the court was not required to find appellant's age to be a mitigating factor, and find no basis for reversal on this issue. *Simmons v. State*, 419 So.2d 316 (Fla.1982).

[17] Defendant further asserts that the court improperly found as inapplicable section 921.141(5)(a) (lack of significant criminal history); we find no merit to this contention. *Booker v. State*, 397 So.2d 910 (Fla.1981), *cert. denied*, 454 U.S. 957, 102 S.Ct. 493, 70 L.Ed.2d 261 (1981). We also find no merit to defendant's contention that section 921.141(5)(b) (defendant was under influence of extreme mental disturbance), was improperly not applied by the court below.

[18] The trial court considered the disparate treatment of Colleen O'Brien, who received immunity, as a possible non-statutory mitigating circumstance. It held, however, that O'Brien was not an accomplice and that mitigation based on this factor was not warranted in this case; we agree. The case at bar is distinguishable on this issue from cases such as *Slater v. State*, 316 So.2d 539 (Fla.1975), where a more culpable co-defendant received a less severe sentence than the appellant, and there was no error in treating the defendant differently than O'Brien. *See Downs v. State*, 386 So.2d 788 (Fla.), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 238 (1980).

We have compared, as did the trial court, the facts in the case *sub judice* with cases where we have upheld the imposition of the death penalty on similar facts and find the sentence imposed to be consistent with those cases. *See e.g., Martin v. State; Griffin v. State*, 414 So.2d 1025 (Fla.1982); *Combs v. State*, 403 So.2d 418 (Fla.1981), *cert. denied*, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). The lower court properly found the existence of five aggravating factors and no mitigating factors. Even though a jury recommendation is to be accorded great weight by the sentencing judge, death is the appropriate penalty in this situation and the judge was proper in overriding the jury in this case. *Stevens v. State*, 419 So.2d 1058, 1065 (Fla.1982), *cert. denied*, — U.S. —, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983).

Defendant's last contention concerns the constitutionality of Florida's death penalty statute both on its face and as applied to the case *sub judice*. Defendant concedes that the issue raised in his brief has been addressed and rejected by this court on previous occasions but invites us to reconsider our position on these issues. We find these contentions to be without merit and decline the defendant's invitation. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979).

Accordingly, we affirm the judgment of conviction and the sentence of death.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON and EHRLICH, JJ., concur.

McDONALD, J., concurs in result only on sentence with an opinion.

McDONALD, Justice, concurring in result only on sentence.

I disagree that the aggravating factor of "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" was properly found in this case. This finding is based on circumstantial evidence

Those circumstances are subject to many hypotheses on why this homicide was perpetrated. This defendant apparently had a terrible temper and had become estranged with his girlfriend. The victim had provided aid and comfort to the girlfriend and had provided a safe harbor for her. It is as likely, and I would say more, that the killing flowed from rage rather than any desire to eliminate the witness to the crime of robbery and thus avoid prosecution for the crime of robbery. Every aggravating factor must be proved beyond a reasonable doubt. This one was not.

This conclusion does not, however, cause me to disagree with the imposition of the death penalty, even in the face of a jury recommendation of life imprisonment. A jury, and the trial judge, has the responsibility of weighing the aggravating and mitigating circumstances. Valid aggravating factors remain in this case; no mitigating circumstances, statutory or nonstatutory, are discernible. There appears to be no rational basis, when viewed in this weighing process, for a jury to recommend life imprisonment. Here the trial judge properly rejected the jury's recommendation. Routly's sentence, even without the aggravating factor mentioned above, should stand.

In re INQUIRY CONCERNING A JUDGE, Richard E. LEON.

No. 63554.

Supreme Court of Florida.

Oct. 20, 1983.

Rehearing Denied Dec. 12, 1983.

Judicial disciplinary proceeding was brought. The Supreme Court held that ex parte conversations with another circuit judge relating to disposition of case, improperly securing alteration of criminal defendant's sentence, engaging in sale of land to father and daughter when daughter's case and sentence are pending before court, falsely denying ex parte conversation with circuit judge, and making false statements concerning activities in criminal cases to Judicial Qualifications Commission warrant immediate suspension without pay and, upon decision becoming final, removal from office.

Order accordingly.

Adkins, J., concurred in result only.

1. Judges ⇐11(5)

Reason for confidentiality of statements made during investigation, in judicial disciplinary proceedings, no longer exists after formal charges are filed and charges become public.

2. Judges ⇐11(5)

It was not reversible error for Judicial Qualifications Commission's counsel to file additional count for misconduct, despite fact that Commission itself was required to file charges, where Commission had already found probable cause on original five counts, there was knowledge of additional count, and there was no request for additional formal meeting of Commission to hold probable cause hearing on new count. West's F.S.A. Jud.Qual.Rules 6, 7.

3. Constitutional Law ⇐278.4(5)

While due process demands that there be proceedings to support recommendation of Judicial Qualifications Commission that judge be suspended without pay, proceedings of Commission which culminate in finding that judge is guilty of several serious charges brought against him, are sufficient to satisfy due process and support recommendation of suspension without pay. U.S.C.A. Const.Amends. 5, 14; West's F.S.A. Jud.Qual.Rule 8.

4. Judges ⇐11(4)

Improper ex parte conversations with another circuit judge relating to disposition of criminal case, improperly securing altera-

IN THE SUPREME COURT OF FLORIDA

MONDAY, DECEMBER 12, 1983

DAN EDWARD ROUTLY,	**	
Appellant,	**	CASE NO. 60,066
vs.	**	Circuit Court Case No. 79-1270-CF-A-01 (Marion)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the Motion for Rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

Deputy Clerk

cc: Hon. Frances E. Thigpin, Clerk
Hon. Carven D. Angel, Judge

Raymond L. Goodman, Esquire
Richard W. Prospect, Esquire

APPENDIX B

IN THE CIR[illegible] COURT of the Fifth Judicial Circu[illegible] the State of Florida, in and for Marion County, in the year of Our Lord, one thousand nine hundred and seventy nine.

THE STATE OF FLORIDA
vs.
DAN EDWARD ROUTLY

Case No. 79-1270-CF-A-01
INFORMATION FOR:
SECOND DEGREE MURDER

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

N. Burton Williams, Assistant To GORDON G. OLDHAM, JR., State Attorney for the Fifth Judicial Circuit of the State of Florida, in and for Marion County prosecuting for the State of Florida, in the said County, under oath, information makes that:

DAN EDWARD ROUTLY

of the County of Marion and State of Florida, on the 17th day of June in the year of Our Lord, one thousand nine hundred and seventy nine in the County and State aforesaid:

did, unlawfully and by an act imminently dangerous to another, and envincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, kill and murder Anthony Bockini, a human being, by shooting him with a firearm, a more particular description being to this Assistant State Attorney unknown, in violation of Florida Statute 782.04;

FILED
DEC 5 4 12 PM '79
Frances E. Higgins
CLERK CIRCUIT COURT
MARION COUNTY, FLA.

contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Florida.

GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit of Florida
By N. Burton Williams Assistant State Attorney

STATE OF FLORIDA, COUNTY OF MARION

Personally appeared before me, N. Burton Williams, Assistant To GORDON G. OLDHAM, JR., State Attorney for the Fifth Judicial Circuit, State of Florida, in and for Marion County, State of Florida, who first being duly sworn, says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true, and which if true, would constitute the offense therein charged. Prosecution instituted in good faith and subscribed under oath, certifying he has received testimony under oath from the material witness or witnesses for the offense.,

N. Burton Williams
Assistant to GORDON G. OLDHAM, JR.
State Attorney, Fifth Judicial Circuit of Florida

Sworn to and subscribed before me this 5th day of December 19 79.

James E. Ray
Notary Public
My Commission expires April 6th, 1982

Presented and filed in the _____ Court this _____ day of _____ 19____.

Clerk of _____ COURT

FLORIDA DEPARTMENT OF CORRECTIONS

~~PRESENTENCE~~ INVESTIGATION

COUNTY Marion

NAME	...A EDWARD ROUTLY	DOCKET #	79-1270
ALIAS NAME		CIRCUIT #	050-8445 DC #
ADDRESS	7035 Normandy Court Flint, Michigan 48506	OFFENSE	1st DEGREE MURDER
AGE 25 DOB	06/12/55 RACE SEX W/M	x ☐ ADJUD. ☐ ADJ. W/H DATE:	7/18/80
LEGAL RESIDENCE	Genesse County, Michigan	ARREST DATE	12/6/79
SOCIAL SECURITY #	368-68-6566	BOND none	RELEASE DATE none
JUDGE	Carven D. Angel	DAYS IN JAIL	since 12/6/79
PROSECUTOR	Gordon G. Oldham, Jr.	ARRESTING AGENCY	Flint City Police Dept
DEFENSE ATTY	Ronald Fox	DLE #	
DISPOSITION			DISP. DATE

OFFENSE - Information resume:

On December 18, 1979 an indictment for 1st DEGREE MURDER was returned by the grand jury charging defendant on June 17, 1979 with unlawfully with a premeditated design causing the death of a human being by killing and murdering Anthony Francesco Bockini by shooting him with a firearm in violation of FS782.04.

Court Appearances: On 12/05/79 a capias for Second Degree Murder was issued and recalled on 12/12/79 On 12/06/79 the defendant appeared in court and the public defender was appointed. On 12/18/79 the subject was indicted by the grand jury of First Degree Murder and on 1/2/80 pled Not Guilty with case set for trial 3/10/80. After numerous continuances subject was scheduled for trial during the July 1980 term. On 7/18/80 subject was found guilty by jury who also recommended an advisory sentence of life imprisonment. On that same date subject was adjudicated guilty by the Honorable Carven D. Angel and referred for a presentence investigation being remanded to custody without bond.

Circumstances: According to reports from the Marion County Sheriff's Department, case #S-79-06-2328, preliminary investigations revealed that between 8 p.m. on 6/17/79 and 1/30 p.m. on 6/23/79 Anthony P. Bockini was shot in the head with a pistol which resulted in his death. His body was left hidden in a wooden area north of the Sparr-Lowell Road just west of 441 and 301. The victims body was located by Phillip Williams who was plowing in a field just north of the Sparr-Lowell Road on land belonging to Bernice Raysor. While turning the tractor around the plow pushed weeds over allowing Mr. Williams full view of the victims body. Mr. Williams immediately went to Mrs. Raysor's house to advise her of his findings at which time the sheriffs department was contacted. The area was immediately marked off by the sheriffs department and evidence was collected and sent for laboratory tests.

On 6/22/79 Charles Brown, investigator with the Marion County Sheriff's Department was summoned to a location on Sparr-Lowell Road where the victims body was found. Investigator Brown observed the position and the condition of the body and made a sketch of the crime scene and assist Investigator Lloyd Adams. Investigator Brown examined the victim's [illegible] and found no trace of the victim's vehicle which was later recovered on 7/5/79 in Lafayette, Louisiana. Subsequent investigations revealed that Investigator Brown was informed on 9/9/79 by Deputy Don Chapman that information had been received that a couple using the names Dan and Colleen were a possible couple involved in this murder. Information was received that the suspect known as Dan also known as Keith Rosencrants and a copy of Florida drivers licence number R252-514-51-381 with the name of Keith Owen Rosencrants was obtained.

The mother of Colleen O'Brian, Mrs. Jacob O'Brian was contacted in Flint, Michigan and advised Investigator Brown that her daughter had left Michigan with a subject named Dan Routly. The police department was contacted in Flint, Michigan and advised Investigator Brown that the suspects full name

is Dan Edward Routly DOB 6/12/55.

Further investigations revealed that the owner and operator of the Surplus Outlet on South Pine Avenue in Ocala, Florida sold a [illegible] 38-caliber revolver model 40 serial #RO88962 on 5/20/79 to Keith Rosencrants. The operator of the store identified the drivers license photograph of Rosencrants as Dan Edward Routly.

After numerous other investigative contacts Colleen O'Brian was interviewed in Flint, Michigan and admitted being present with defendant and participating in the murder of Anthony Bockini. On December 5, 1979 defendant was interviewed by Lt. Larry Gerald who advised him of his Constitutional Rights at which time defendant admitted killing the victim. During that confession defendant revealed that he became aware of the victim when his girlfriend, Colleen had advised him that the victim had given her a ride while she was hitchhiking. Defendant advised that he had an argument with Colleen after which he drove her to the victims house. Subject admitted entering the residence of the victim where he indicated that he pulled a gun on him and told him to lay down on the bed and tied him up and searched his house for some money. After taking a undisclosed amount of money from his wallet defendant admitted stealing some radios and things he could sell and then carried the victim who was tied up and placed him in the trunk of his car. Defendant then stated that he and Colleen got in the victims car and drove it through some back road outside of Ocala. Defendant stated that he pulled off into a deserted area and noticed that the back lights of the car had been damaged. Defendant stated that he opened the trunk and removed the victim and asked him why he had damaged the rear lights at which time in his anger defendant admitted shooting him three times. Defendant then stated that he dragged the victim back into the bushes where his body was hidden. Subject then indicated that he drove to Tallahassee, Florida where he purchased two bus tickets to Grand Prairie, Texas. After purchasing the tickets subject stated that he took the victims car to the car wash and washed it all down in the trunk and cleaned the inside out in an attempt to remove the fingerprints. Defendant then indicated that he parked the car at a bar, left the keys in it, hoping that someone would steal it. Subject and Colleen then went to Grand Prairie, Texas where he claimed to have traded the murder weapon for a three wheel mail truck. From Texas subject returned to Flint, Michigan where he was apprehended.

Defendant's Statement: Defendant when interviewed in the Marion County Jail completely denied his guilt in this offense. Defendant claims that he cohabitated with Colleen O'Brian for approximately one year in Michigan. Claims they travelled to Ocala and resided here for approximately two months when Colleen had advised him that the victim had fondled her after he picked her up while she was hitchhiking. Subject claims that Colleen indicated that the victim had given her his car and talked defendant into returning to Michigan. Subject claimed to have driven the victim's car to Louisiana where Colleen allegedly informed him that the victim was dead. At that point the defendant claims that he washed the car inside and out to remove the fingerprints believing it to have been stolen. Subject then indicated that they left the automobile, purchased a ticket to Grand Prairie, Texas and stayed there for approximately six months. Claims they eventually returned to Michigan where rumors were circulating that subject was wanted for killing three policemen, raping numerous women and child molesting. Claims Colleen was arrested for murder and subject tried to get bond money for her and in his attempt to have her released he was apprehended. Subject admitted to confessing to the second degree murder charge in order to spare Colleen's life based on alleged plea negotiations that he would receive ten years state prison.

PRIOR ARRESTS AND CONVICTIONS

Juvenile: Subject has the following juvenile arrest history in Flint, Michigan.

03/17/70	Petition filed by Dean of Students at George Daly Jr. High School for carrying concealed weapons (chain and 9" knife).
03/17/70	Removed from the parental home to the Juvenile Facility.
03/27/70	Placed from the Juvenile Facility to a parental home.
04/01/70	Probation granted by Probate Judge Yeotis.
10/08/71	Probation terminated, case dismissed.
04/19/71	Petition filed by Sheriff's Department for being a runaway and U.D.A.A. at age 15.
04/19/71	Removed from parental home to Juvenile facility.
05/04/71	Probation granted by Probate Judge Borradaile.
05/04/71	Transport from Juvenile Facility to Parental home.
08/31/71	Petition filed by Sheriff's Department for U.D.A.A.
10/29/71	Petition dismissed without prejudice.

ADULT ARREST HISTORY:

Sheriff's Office Flint, Michigan	03/09/74	Suspected of Larceny from Auto	Released 03/11/74
Sheriff's Office Flint, Michigan	05/13/74	Breaking & Entering	Nolle Prosse
Police Department Flint, Michigan	06/06/74	Speeding	$24 or 3 day
Police Department Flint, Michigan	06/06/74	Kidnapping	Released PFI 06/07/74
State Police Flint, Michigan	07/02/74	Breaking & Entering	Pled Guilty to Attempted B & E 2½ yrs 5 years
SPOL East Tawas, Michigan	06/15/75	Escape	15 months to 5 years consecutive
Department of Corrections Flint, Michigan	03/20/79	Warrant issued Violation of Parole absconder	Pending

SOCIAL HISTORY

Family: Defendant's father, Robert Leonard Routly DOB 01/08/28 reportedly died July 1973 as a result of a heart attack. Subject described his father as a strong disciplinarian who abused alcohol to the point of being a "drunk" however allegedly had no arrest history and reportedly enjoyed a good relationship with him. Subject's mother, Magdeline Mauti Routly DOB 02/28/30 resides at 7035 Normandy Court, Flint, Michigan. Subject claims his mother is a nurse at the Briarwood Manor Convalescent Home in Flint, Michigan and enjoys a "fair" relationship with her.

Subject is reportedly the third born of eight siblings. He has four brothers and three sisters with ages ranging from age 32 to age 10.

Subject's oldest brother, John Routly DOB 5/5/50 is the only known member of his family to have received state incarceration and was housed within the Michigan Department of Corrections serving four years eight months to ten year sentence for breaking and entering.

Subject describes his childhood as an unhappy time caused by his father abusing alcohol and subsequent abuse of his father to both subject and his family. Subject also indicated that his childhood was an unpleasant time of life as he was required to attend a strick Catholic School at an early age.

Education: Records from the Department of Corrections from Flint, Michigan verified that subject completed his high school requirements for diploma certification at Kearsley High School in Flint, Michigan where he graduated in 1973. Subject denied any disciplinary problems however admitted to be referred to the school psychologist for his disruptive behavior.

Marital: Subject claims to have married Judy Ann Ray on 9/3/73 in Genesse County, Flint, Michigan which marriage resulted in a divorce circa 1977 while subject was in prison. Prison records verify subject's marriage but make no mention of his reported divorce. Subject claims to have one son, Mark Edward who is seven years old and has not supported him.

Residence: Subject reports his legal address as 7035 Normandy Court, Flint, Michigan which has been verified as his mother's home. This residence can be described as a four bedroom two bath frame house constructed by subject's father. Residences in Marion County have been verified in Reddick, Florida. During the months of April and May subject and Colleen O'Brian rented a one bedroom trailer from employer Phil Morris (address: General Delivery, Reddick, Florida). This residence was provided without charge in connections with subject's employment with Mr. Morris.

It is been verified that subject rented a garage apartment from Bob Gibson (General Delivery, Reddick) during the month of June 1979. Rent was provided free in exchange of employment duties. This residence can be described as a small one bedroom garage apartment located behind the residence of Mr. Gibson.

Subject claims since his prison commitments he has lived a transitory life style throughout numerous states.

Religion: Subject claims to believe in God, prays daily, does not believe in organized religion.

Interests and Activities: Subject claims to spend his spare time working on cars and motorcycles. Claims while incarcerated he spends most of his time reading the Bible. Subject claims to smoke approximately one package of cigarettes per day and classifies himself as a moderate drinker however when he drinks he does so to "get high". He admits experimentation with most illegal drugs since being an senior in high school. He denies any current drug addiction.

Military: He has no military history.

Health: Defendant is 6' tall and weighs 183 pounds with black hair and brown eyes. At the time of the interview he had a full beard. On his left forearm he has a tattoo of a rose and the name Judy Ann. He denies any serious illnesses or accidents and claims to be in good physical health. Subject admits psychiatric evaluations since being a student in the third grade.

Employment: It has been verified that subject has developed a record of employment instability. Subject's employment in Marion County has been verified through Phil Morris, of Reddick, Florida. Subject was hired

04/31/80 under the name of Keith Rosencrants. Subject averaged $100 per week plus the use of free residence and utilities. Subject was employed doing miscellaneous mechanical and labor work at an automobile salvage yard own by Mr. Morris. Employment was terminated 06/15/80 at which time subject was fired due to a lack of productivity.

It is also been verified that subject was employed during June 1980 operating a wrecker for Bob Gibson in Reddick, Florida. Subject was employed on a part time basis in return for free lodging in a small garage apartment owned by Mr. Gibson.

Previous employment have been of short term duration of general type labor and service station attendants. Subject claims to be skilled as a mechanic and welder.

Economic Status: Subject denies any assets and claims liabilities in an undetermined amount representing delinquent child support payments.

IV. COURT OFFICIALS STATEMENTS

Lt. Larry Gerald, arresting officer, considers the defendant a very dangerous individual who admitted killing the victim however showed no remorse whatsoever for his actions. Lt. Gerald indicated that the victim was an elderly man who presented no threat to defendant. Claims this case was simply a cold blooded murder. Lt. Gerald recommends the death penalty for an appropriate court disposition.

Gordon C. Oldham, Jr., state attorney for the Fifth Judicial Circuit of Florida, was adamant in his recommendation that subject should receive the death penalty. Mr. Oldham indicated that he would have further comments to make at the time of sentencing.

Ronald Fox, defense attorney, recommends life imprisonment because of subject's age and lack of prior violent criminal record.

V. PLAN

Subject expressed no future goals or plans other then his desire to be released from incarceration. Due to the seriousness of subject's offense, probation is not an option available.

"I HEREBY CERTIFY THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF."

DEPARTMENT OF CORRECTIONS

BY _____ APPROVED BY _____

Paul M. Carr
Probation & Parole
Senior Officer
050-Ocala

Douglas A. Robinson
Supervisor III

DATE September 2, 1980

PMC/cs

CONFIDENTIAL EVALUATION

NAME Dan Edward Routly DIST. # 050-8445

I. OFFENSE

When this officer interviewed subject he completely denied any guilt concerning the murder of Anthony Bockini. This officer has no doubts concerning subject's guilt as he admitted in detail how he killed the victim to investigators at the sheriff's department. It has also been verified with contact by a trustee at the Marion County Jail (who wishes to remain anonymous due to fear), that defendant vividly told him in a bragging manner how he killed Mr. Bockini. Extensive investigations from the Marion County Sheriff's Department as well as subject's confession revealed that mitigating circumstances may have been subject's uncontrollable temper.

II. PRIOR ARRESTS AND CONVICTIONS

Subject received his first commitment to the state prison after pleading guilty to attempted Breaking and Entering in Flint, Michigan. Subject was arrested on July 2, 1974 for this offense which involved the defendant and three others breaking into the Lakeview High School near Otisville, Michigan on May 4, 1974. Extensive damage was reported inside the school as result of this breaking and entering with damaged property totally $4,114.80. For that offense subject received 2½ to five years sentence.

On April 15, 1975 subject escaped from state prison in Michigan and remained at large until 06/15/75 when he was arrested by the Michigan State Police. Subject indicated that he escaped after talking to his wife on the telephone learning that a man was trying to take advantage of her. Subject left the prison on foot and hitchhiked home (Flint, Michigan) and lived with his wife for approximately two months moving from city to city throughout Michigan.

Subject was paroled on 05/01/78 for 24 months and absconded on 12/13/78 with a warrant charging him with Violation of Parole being issued on 03/20/79. That warrant is still outstanding.

III. SOCIAL HISTORY

Mental Health: On 03/27/80 a court ordered psychiatric evaluation was conducted by Dr. Rafael J. Gonzales in which defendant was diagnosed as having an inadequate personality with antisocial features. Dr. Gonzales indicated that defendant is very well aware of the nature of the present charges and that he could be assistance to his attorney in order to prepare his defense.

On 03/20/80 Dr. Fausto A. Natal, conducted a court ordered psychiatric evaluation and diagnosed subject as antisocial personality disorder. Dr. Natal indicated that subject understood the miranda warning and was psychologically able to waive his rights and indicated in his opinion that defendant is competent to stand trial.

IV. PERSONAL STATEMENTS

Phil Morris, prior employer of defendant, verified his employment record and indicated that he fired defendant on 06/15/80 after which defendant threatened to kill him with a 38 caliber pistol. Mr. Morris expressed deep concern for his family as well as himself if defendant would ever be released from prison claiming subject is a very dangerous individual.

Bob Gibson, verified subject's previous residence and part time employment with him. Claims subject drove a wrecker on a part time basis in return for free residence in his garage apartment. Mr. Gibson indicated that he was with subject when he threatened to kill Phil Morris the day he was fired. Claims subject is unpredictable and very dangerous.

Charles Brown, investigating officer with the Marion County Sheriff's Department. Claims subject is very dangerous and should never be allowed outside of confinement. Investigator Brown stated that an inmate at the Marion County Jail admitted that subject described the murder in detail to him while they shared the same cell and he has no doubt of subject's guilt.

John Logue, Classification Officer with the Marion County Sheriff's Department, claims subject presented no problem as an inmate until after he was convicted of this murder. Claims since the conviction subject has been a consent escape risk and displayed a bitter attitude. Claims since his recent suicide attempt he has required around the clock supervision and presented multiple problems at the jail. Mr. Logue recommends the death penalty solely to prevent the defendant from killing anyone in the future.

Fred LaTorre, investigating officer with the Marion County Sheriff's Department, was assigned the investigation concerning subject's attempted suicide while confined at the Marion County Jail. Investigator LaTorre indicated that in his opinion subject was not trying to kill himself but was simply attempting to arrange for his transportation to the hospital where he could escape. Subject received no lasting ill affects from that attempt with no damage to the trachea or the neck from his attempt to hang himself.

Lt. Pauls, Marion County Sheriff's Department, indicated that since subject's conviction he has been a constant problem at the jail. Claims subject has nothing to loose and is an extreme escape risk. Claims subject's most recent escape attempt was one of the most serious this county had seen. Claims it was well planned as subject had made complete drawing of the jail and was to escape during the sick call with the opportunity for someone to be hurt being very great. Claims if a trustee had not recovered a gun which was allegedly planted outside by defendant's girlfriend subject quite possibly could have escaped. Lt. Pauls indicated that subject will always be a future escape risk with the chances of him escaping being well above average. Lt. Pauls indicated that subject loves publicity and compares him to someone with the Charles Manson syndrome.

V. ANALYSIS

Before the court is a 25 year old male who has been convicted of First Degree Murder in that he shot an elderly man who was bound and gagged and therefore helpless. Reports indicate that subject in the presence of his girlfriend, Colleen O'Brian, entered the residence of Anthony Lockini on June 17,1979, robbed him at gun point, tied his hands and feet, placed him in the trunk of the victim's own car and transported him to a remote area of Marion County where defendant by his own admission shot the victim three times and left the body in an isolated field.

Defendant is a high school graduate with above average intelligence who has developed a record of criminal behavior since age 14. He has been sentenced to two prior felony convictions including an escape from state prison in Michigan. He is a parole violator and committed this murder after absconding from Michigan. While an inmate in the Marion County Jail he has allegedly attempted an armed escape as well as a suicide attempt which investigators assess as another effort to escape. He currently requires around the clock supervision while

in custody.

People contacted during the completion of this investigation who have had direct contact with defendant describe him as an extremely dangerous individual and express concern in regards to his return to society.

The above information is submitted for the courts consideration.

"I HEREBY CERTIFY THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF."

DEPARTMENT OF CORRECTIONS

BY_____ APPROVED BY_____

Paul W. Carr
Probation & Parole
Senior Officer
050-Ocala

Douglas A. Robinson
Supervisor III

DATE September 2, 1980

PWC/cs

STATE OF MICHIGAN

IN THE 68TH DISTRICT COURT FOR THE CITY OF FLINT

THE PEOPLE OF THE STATE OF MICHIGAN

V

DANIEL E. ROUTLEY,

Defendant.

WAIVER OF EXTRADITION

BEFORE THE HONORABLE BASIL F. BAKER, JUDGE

Flint, Michigan - Wednesday, December 5, 1979

Janet L. Gifford CER-0638

Flint, Michigan

Wednesday, December 5, 1979 - at about 2:17 P.M.

(Court and all other parties present)

THE COURT: Okay, you're Dan Routley?

MR. ROUTLEY: Yes sir.

THE COURT: You want to step up in front of the lectern there.

You, ah, you're evidently charged with an offense in the State of Florida. Is that right - Second Degree Murder?

MR. ROUTLEY: Yeah.

THE COURT: And you are desiring to waive your right to have extradition on this. Is that - is that your- -

MR. ROUTLEY: Yes your Honor.

THE COURT: But you're - you understand you have a right to have a hearing on this and have a right to have counsel. You understand all that do you?

MR. ROUTLEY: Yeah.

THE COURT: And you're - you're willing to give up all t[illegible]e rights, are you, to - and to go back voluntarily to Florida to - to stand trial for this offense. Is that right?

MR. ROUTLEY: Yes.

THE COURT: Okay. Now he has got to sign this

here, now.

Has he read this do you know?

OFFICER HARRIS: No he hasn't your Honor.

THE COURT: All right. Have him read it - yeah.

(At about 2:18 P.M. Defendant Routley reads waiver and signs it.)

THE COURT: What about this - what about this affidavit of - -

OFFICER HARRIS: Usually the - -

THE COURT: What?

OFFICER HARRIS: Usually the complaining officer signs that.

THE COURT: Okay. It's all done except for that. All right.

COURT RECORDER: You don't have to swear him to it? "Subscribed and sworn before me on," and it is signed by you.

THE COURT: What?

COURT RECORDER: And it says to be signed by a District Judge. Do we need it- -

THE COURT: Let me see.

COURT RECORDER: I don't know, I've never seen it before.

OFFICER HARRIS: - - should have been on top, I suppose.

THE COURT: Oh yeah, I've got to sign it - yeah you swear to this do you?

OFFICER HARRIS: I do.

COURT RECORDER: He has got to sign it too.

THE COURT: Yeah, I know it. Sign it and then - yeah.

COURT RECORDER: There you go.

OFFICER HARRIS: Thank you.

COURT RECORDER: Get your copies.

(At about 2:20 P.M. waiver completed)

(STATE OF MICHIGAN)
) SS
COUNTY OF GENESEE)

I, Janet L. Gifford, Certified Court Recorder of the 68th District Court, State of Michigan, do hereby certify that the foregoing pages 1 through 4, inclusive, comprise a full, true and correct transcript of the proceedings and testimony taken in the matter of Daniel Routley, on Wednesday, December 5, 1979.

Janet L. Gifford

Certified Court Recorder/CER-0638

Flint, Michigan

July 1, 1980

"WHEREAS, the Legislature has previously acknowledged its concern over the disparity in sentencing practices between the various judicial circuits in Florida by enacting chapter 79-362, Laws of Florida, and

"WHEREAS, the Legislature by its previous act has acknowledged and approved of the continuing work of the Sentencing Study Committee of the Florida Supreme Court, which was charged with identifying the extent and causes of sentence disparity, to explore the range of sentencing reform alternatives available, and to reduce unreasonable and unjustifiable sentence variation, and

"WHEREAS, the Sentencing Study Committee's first step in the development of the sentencing guidelines pilot project was to gather the empirical data necessary to describe the implicit sentencing policy operating within each of the four judicial circuits where the study was to be carried out, and

"WHEREAS, reports from the four judicial circuits where the test was conducted indicate that a system of sentencing guidelines is a viable solution to the problem of ending sentencing disparity and will likely lead to more certainty and fairness in the sentencing process, and

"WHEREAS, a necessary first step in implementation of the sentencing guidelines system on a statewide basis is the collection of additional sentencing data from all 20 judicial circuits in Florida, and

"WHEREAS, the Legislature believes that it is in the public interest for a system of sentencing guidelines to be developed and implemented on a statewide basis within the sentencing parameters established by the Florida Statutes and in furtherance of this goal it is necessary for the Legislature and the courts to join together in a cooperative sentencing reform effort aimed at assuring certainty of punishment for the guilty and equality of justice for all, NOW, THEREFORE,"

Library Ref ...

Criminal Law ⇔1208.

C.J.S. Criminal Law § 1980 et seq.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) **Separate proceedings on issue of penalty.**—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **Advisory sentence by the jury.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be recommended to life imprisonment or death.

(3) **Findings in support of sentence of death.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Amended by Laws 1972, c. 72-724, § 9, eff. Dec. 8, 1972. Amended by Laws 1974, c. 74-379, § 1, eff. Oct. 1, 1974; Laws 1977, c. 77-104, § 248, eff. Aug. 2, 1977; Laws 1977, c. 77-174, § 1, eff. Aug. 2, 1977; Laws 1979, c. 79-353, § 1, eff. July 3, 1979.

Laws 1972, c. 72-724, § 8, substantially rewrote this section.

Laws 1974, c. 74-379, § 1, added the third sentence to subsec. (1).

Laws 1977, c. 77-104, a revisor's bill corrected errors and deleted obsolete or expired provisions. See Revisor's Note—1977.

Laws 1977, c. 77-174, a revisor's bill, amended this section to reflect language editorially inserted by the division of statutory revision and indexing.

ORIGINAL

NO. ~~A-610~~ 83-6405

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAN EDWARD ROUTLY

Petitioner,

V.

STATE OF FLORIDA

Respondent.

RESPONSE TO

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

RICHARD W. PROSPECT
ASSISTANT ATTORNEY GENERAL

125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-1067

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

In addition to those facts stated by Petitioner and those found in the opinion of the Florida Supreme Court, the following should be considered.

In mid-1979, Petitioner Dan Edward Routly (also known as Keith Owen Rosencrantz) was traveling with Colleen O'Brien in the Ocala area looking for jobs. (R-887) A local junk and salvage dealer in Reddick employed Routly as a part-time mechanic and general handyman. (R-695) Routly and O'Brien were allowed to stay in a small trailer on the operator's property. (TT-697)

During this period of employment, Routly was seen shooting a blue-steel .38 caliber inexpensive pistol at some fence posts on the property. (R-701) Routly and the salvage operator had a disagreement which lead to the termination of employment. The apparent source of the trouble was that the operator had picked Colleen up from work and instead of driving her directly home, spent approximately five hours at a bar called "Joe's Place." (R-709) Routly and Colleen then went to live with James Gibson in a garage apartment next to Gibson's house. They stayed for three or four weeks.

On one occasion, Gibson saw an elderly man bring O'Brien to the apartment. Gibson had never seen the man before and had not seen him since. (R-729) The last time he had contact with O'Brien was when she called requesting money for purposes of purchasing a bus ticket to go back up north. (R-730) Without notice of any kind, Routly and O'Brien moved out in the middle of one night. (R-725)

Apparently while living at Gibson's apartment, the couple also took up residence at a campground. (R-888) Because they were not getting along, O'Brien left Routly. (R-890)

Although the next sequence of events is not exactly clear, it appears that O'Brien found herself accepting a ride from some man. (R-891) After a discussion, this man gave her a note with his name and phone number and told her that if she needed any help to call him. (R-892) He dropped her off and she

went to see Routly. (R-893) Rogether they went to the campground. (R-893) Their troubles had not smoothed over, and the next morning she called this man and asked him to come pick her up. [Colleen identified the man as Tony and testified that he was the same as pictured in State's Exhibit 1, the deceased. (R-893)]

Tony took Colleen to his house and she began making preparations to take a bus back to Michigan. (R-894) Colleen stayed at Tony's house overnight. (R-899) Tony took Colleen to where Routly was staying and she gathered her belongings and returned to Tony's place. (R-900) Tony left his house leaving Colleen there alone. (R-900) Colleen saw Routly walk by the window and went outside to talk to him. (R-901) Routly was upset and told Colleen that he didn't want her to leave. (R-901) The two went back inside the house and Tony returned. (R-901) Routly started to leave but apparently remained within the house. (R-901, SR-15) Routly pulled a gun on Tony and told him to lay down on the bed. He then tied Tony up and went through his house looking for money. He broke open one or more ceramic banks which he found in drawers. (SR-15) Routly took the change and the couple of dollars from Tony's wallet. (SR-15)

Routly then told Colleen to pack her suitcase and at that time Colleen thought she saw Routly with a gun. (R-902) Whether Routly carried him or whether Tony walked by himself, Tony ended up in the trunk of his own car. According to Colleen Tony walked to the trunk but according to Routly, both hands and feet were tied and Tony was gagged with a bandanna. (SR-15) Routly drove out in the country looking for a field or, apparently, some other deserted place. (SR-16) He noticed that his brake lights were not working, so he pulled the car over, and went to the trunk. As Colleen stood nearby, Routly shot Tony. (SR-17, R-905) Colleen and Routly dragged Tony's body back into the bushes. (SR-17, R-906)

Routly then picked up another woman and her daughter

and all four drove north in Tony's car. (SR-17) He dropped the other woman and daughter in Tallahassee and told her that he had shot somebody. (SR-17) He and O'Brien then drove to Louisiana. Routly took the car to a car wash and cleaned it inside and out trying to get the fingerprints out. (SR-18) He then parked the car at a bar leaving the keys in it hoping someone would steal it. (SR-18)

On June 23, 1979, the body of Anthony Bockini was discovered approximately 15 feet off the road. Time of death was estimated to have occurred from three to five days prior to June 23rd. (R-744) The body was somewhat decomposed, and an autopsy revealed the cause of death as a gunshot would which caused not only fractures of the bones in the head and neck but also injury to the spinal cord at the base of the skull. (R-743, 744) A bullet was recovered from the body at the autopsy. (R-744) That bullet had similar characteristics to those recovered from the fence post on the salvage operator's land. It could have been fired from a weapon described as being purchased by Routly. (R-871) When autopsied, the body had a white shirt with the insignia "Marion Community Hospital" on it, a blue ballpoint pen in the pocket, a name tag bearing the name "Anthony Bockini", a read bandanna around the neck, dark blue trousers and dark blue socks. (R-738,739)

Later that year in early December, Colleen O'Brien was arrested for larceny and was in custody in the City of Flint, Michigan. (R-1002) While in that custody she told the Michigan police officers that Routly had shot a man in Florida. (R-911, 926) At that point in time, there were several outstanding criminal warrants for Routly's arrest from the State of Michigan and the Michigan authorities had been looking for him at that precise moment. (R-1001)

Because of Colleen's statements the Michigan police contacted the Marion County Sheriff's Department and Investigator Alioto and Sergeant Jerald traveled to Flint, Michigan and questioned Colleen O'Brien. (R-1002,225, 240)

On information and belief not appearing in this record,

Flint Police Officer Rutherford, while working with a special surveillance unit, was watching a named address, particularly looking for Dan Edward Routly. (R-985) At approximately 12:45 a.m. on December 5, 1979, he observed through binoculars, a crouching figure enter a car parked at the address being watched. (R-985) All that could be determined was that the person was a white male. (R-986) The person started the car, backed out of the driveway, and took off at a fast rate of speed and without any headlights. (R-986)

Flint Police Officer Black was assigned to marked patrol car duties at that time. (R-989) As a result of contact with fellow officers, he and his partner, who were in the process of looking for Dan Routly and had knowledge of him several days prior to that date, (R-990) intercepted a vehicle traveling at a high rate of speed without its headlights believed to be driven by Dan Routly. When the car stopped, Routly jumped out and began to run and Officer Black chambered a shell in his shotgun and warned Routly to stop or he would shoot. (R-991) Black testified that Routly was arrested for "questioning in regards to a murder in the State of Florida." (R-992) He also mentioned that there were other charges but the other officers "didn't go into those." (R-993)

Once in custody, Routly was met by the Florida officers. When the Florida officers first saw Routly, they introduced themselves, advised Routly of his Miranda rights and stated that they wanted to talk to him about the murder of Anthony Bockini. (R-203),243) Routly replied that he would like to first talk to the Flint police authorities. (R-203,243) He spoke with Officer Hanna and inquired about the various charges that were outstanding in the State of Michigan. (R-1003) The only thing Hanna told Routly was that the Florida case would take precedence over the other cases and that he could not say one thing or another with regard to the pending charges in Michigan. (R-1006)

Routly then returned to the Florida officials whereupon they reminded him of the earlier rights advisement. (R-25) He

then confessed. (SR-13,20)

With regard to the voluntariness of that statement, the record reveals that Appellant was read his rights from a card issued by the Marion County Sheriff's Department. (R-204) Routly acknowledged that he understood his rights and at that time he appeared in a normal state and in possession of his faculties. There was no indication or odor of alcoholic beverages and no indication from his actions that he was under the influence of any narcotic or drug. He had no trouble walking, sitting, or standing. He was articulate and able to be understood, with a very good attitude towards the officer. (R-204-206) Routly was neither coerced nor promised anything. (R-242) He was informed of the nature of the charge against him. (R-251) Possible penalties for that offense were not discussed. (R-251) At no time did Routly refuse to answer any questions. (R-252) Routly was aware that O'Brien was in custody and as far as the officers knew, Routly knew that she was pregnant. (R-253) Routly was not told that O'Brien had given a statement indicating him in the murder. (R-253) He was not told that if he gave a statement O'Brien would be released from custody. (R-225,254) No statements making the unsavory connection between jail and a baby were made or suggested to Routly. (R-227,256) He was not told that he needed to help O'Brien or that the baby would be taken away. (R-256)

REASONS FOR NOT GRANTING THE WRIT

The Confession Issue

Petitioner moved to suppress his confession as evidence. He essentially argued that his Michigan arrest was illegal and thus any statement flowing therefrom was inadmissible and in any event, he confessed only because of unlawful coercion in the form of certain promises. A hearing was held and the motion was denied.

Under Florida law, even though a pretrial order denying a motion to suppress has been entered, a criminal defendant must nevertheless contemporaneously object to the admission of the

contested evidence at trial. Failure to do so waives the right to appellate review of any allegation of error. Jones v. State, 360 So.2d 1293 (Fla. 3d DCA 1978). This authority was specifically adopted by the Florida Supreme Court in this case. Routly v. State, 440 So.2d 1257 (Fla. 1983), at 1260. Also cited was its decision in Steinhorst v. State, 412 So.2d 332 (Fla. 1982), standing for the proposition that an appellate court will not consider an issue unless it was presented to the lower court and further, only the specific contention asserted at trial will be recognized on appeal. Id. at 338.

A review of the trial transcript reveals that a tape recording of Petitioner's confession was offered into evidence as follows:

> BY MR. FITOS: Your Honor, the State of Florida would offer the tape in the prosession of Investigator Alioto into evidence at this time to be correctly and accurately portraying the statement that was made on that evening as testified to the Court by this witness --
>
> BY THE COURT: Any objections?
>
> BY MR. FOX: Yes, Your Honor. I object, other than the Court's prior ruling which I'm aware of, object on the ground that there has not been a proper predicate to its publication to the Jury.
>
> BY THE COURT: Overrule the objection. This is admitted into evidence. (R-1051)

Later the State offered a transcript of the tape recorded confession thusly:

> BY MR. FITOS: Your Honor, at this time the State would move for introduction of the transcript of the tape which has been published to this Jury into evidence as State's Exhibit Number 21.
>
> BY MR. FOX: And as to the admissibility of the transcript, Your Honor, I would object on the grounds that it's cumulative to the tape. It's no more probative than the tape. The best evidence is the tape and it has been published to the Jury. It is of no probative value.
>
> BY MR. FITOS: Your Honor, it is of probative value for the following reasons.
>
> BY THE COURT: Objection overruled. (R-1064)

Applying the above-cited law to the above quoted facts,

the Florida Supreme Court found:

> "At the outset and dispositive on this issue is the fact that the defendant failed to make a contemporaneous specific objection at trial." 440 So.2d at 1260. (emphasis added)

Relying on the above-cited authority, the court squarely held that Petitioner could not raise this issue (relating to the admissibility of his confession) on appeal.

The contemporaneous objection requirement which Petitioner failed to observe was the same one representing procedural default in Wainwright v. Sykes, 433 U.S. 72 (1977). That the Florida Supreme Court considered the issue on the merits should not and, it is submitted, does not alter the fact that there existed an adequate and independent state ground disposing of the issue. Accordingly, since this procedural default would have prevented direct review here, Wainwright v Sykes, supra, there exists no reason to grant the writ. Moreover, it is noted that Petitioner does nothing to demonstrate that the procedural default basis was inadequate or in any other way not accountable for the decision below. This he is required to do in order to establish jurisdiction. Durley v. Mayo, 351 U.S. 277 (1956).

Despite the above, the Florida Supreme Court provided the adjunctive view that even had the issue been properly preserved, it was as a matter of fact and law, meritless. With regards to the legality of the arrest in Michigan, the court held that the record provided ample evidence of probable cause to arrest Petitioner either on the basis of what was told them by Petitioner's girlfriend or the existence of outstanding Michigan warrants for Petitioner's arrest.

Regarding the assertion of promises inducing the confession, the Florida Supreme Court gave complete deference to the factual determination of the trial judge who, after listening to testimony, determined that the true facts were adverse to Petitioner. The Florida Supreme Court found that the record fairly supported that determination and refused to interfere.

440 So.2d at 1261. See Marshall v. Longberger, ___U.S.___, 103 S.Ct. 843 (1983); Sumner v. Mata, 449 U.S. 539 (1981).

Rather than addressing the lack of specific objection, Petitioner makes an emotional plea for review questioning the due process propriety of using a defendant's statement as a source of aggravating evidence. In response, we only note that until John Spinkellink took the stand at his trial, the state was totally unaware of the motive of the killing, to wit: pecuniary gain. It could be considered that the defendant there helped to provide that which resulted in his eventual execution. Spinkellink v. State, 313 So.2d 666 (1975).

Presentence Investigation Report Issue.

Here there is no issue preserved much less one involving a federal question. Attached hereto is a short appendix consisting of the transcripts of two separate sentencing hearings. Even a quick examination of those transcripts shows that Petitioner failed at any point to raise the federal question which he now seeks to argue and perhaps this explains why the requirement of Rule 21.1(h) has not been observed.

Petitioner received the presentence report and was obviously given full opportunity to either explain or deny any of the information contained therein. Nothing was "secret"; nothing was kept from either Petitioner or his attorney. The only thing offered to the trial court regarding the report was a general philosophical presentation against such reports and their use in determining sentence. Although Petitioner gamely endeavored to discredit the concept of such report, he failed to either deny the contents of this particular report or challenge the accuracy of any information. No request was made to present evidence to refute what was stated in the report; no request was made to examine the sources of the information in the report; and aside from general remarks expressing dissatisfaction, no specific objection to the substance of the report was lodged.

Federal constitutional issues attempted to be raised

in a petition for writ of certiorari but not presented to the state courts below will not be decided. Cardinale v. Louisiana, 394 U.S. 437 (1969). Similarly, in Street v. New York, 394 U.S. 576 (1969), this Court declared that when the highest court of the state failed to pass upon the federal question, it will be assumed that the omission was due to want a proper presentation in the state courts unless the aggrieved party can affirmatively show otherwise. See also, Fuller v. Oregon, 417 U.S. 40 (1974); Herndon v. Georgia, 294 U.S. 441 (1935); Beck v. Washington, 369 U.S. 541 (1962).

Of note is the fact the Florida Supreme Court made no mention of this issue whatsoever. Considering that we there urged the lack of proper preservation it is clear to Respondent that the reason for the court's silence was the procedural default occurring by the failure to object on any specific ground of prejudice.

Jury Override Issues.

For the reasons stated immediately above, Petitioner is not entitled to the writ to review the issues he presents regarding the override of the jury recommendation of life. Once again, no issue whatsoever, whether federal or otherwise, was either raised or decided in the Florida Supreme Court. The only error Petitioner argued to that tribunal regarding the sentence of death was that the trial court improperly found factors in aggravation, failed to find circumstances in mitigation, and ignored the jury recommendation of life. However, the constitutionality of the process whether as applied to this case or in general terms was never raised either at trial or on appeal.

Respondent is aware of the grant of certiorari in Joseph Spaziano v. Florida, Case No. 83-5596 and is aware that one of the issues raised in that case is the constitutionality of Florida's jury override procedure. Respondent is also aware, however, that the precise issue was raised in the state court by the petitioner in that case. We likewise note that the Petitioner in this case, apparently unable to present original argument, has virtually copied the language in Spaziano's

petition verbatim in an apparent effort to sympathetically persuade that he too is worthy of having his case reviewed despite the fact that he never raised the question below. Respondent contends that this is an insufficient reason to grant review especially since the other issue in the Spaziano case is the apparent area of concern in light of this Court's continued denial of certiorari in the many cases which have attacked the practice of overriding a jury recoomendation of life.

CONCLUSION

Petitioner has presented nothing to properly demonstrate why his case is worthy of review. To his detriment, the issues he here presents all suffer the fatal defects of either improper preservation below or a total lack of preservation on any basis.

The evidence against the Petitioner was overwhelming and the sentence imposed upon him was based only on evidence presented and was not imposed in reliance on any unconstitutional source. Petitioner did not show nor did he make an attempt to show that anything in mitigation existed. Although not raised by the Petitioner, the Florida Supreme Court reviewed the evidence for its sufficiency, 440 So.2d at 1262, as well as the sentence imposed. That court gave Petitioner the benefit of proportionality review, id. at 1266, and concluded that there properly existed five factors in aggravation and nothing in mitigation. Despite the jury's recommendation, the court held that the penalty was appropriate in this case. Petitioner has shown absolutely nothing why that determination should be disturbed and accordingly, the writ of certiorari to the Florida Supreme Court should be denied.

Respectfully submitted,

April 16, 1984

Richard W. Prospect

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. A-610

DAN EDWARD ROUTLY

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

APPENDIX

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR MARION COUNTY.
CRIMINAL ACTION.

CASE NO. 79-1270

STATE OF FLORIDA,
Plaintiff,
vs.
DAN EDWARD ROUTLY,
Defendant.

PROCEEDINGS: Sentencing

BEFORE: The Honorable Carven D. Angel
Circuit Judge
Fifth Judicial Circuit of Florida
Ocala, Florida 32670

PLACE: Circuit Courtroom
Marion County Courthouse
Ocala, Florida 32670

DATE AND TIME: September 15, 1980, 9:00 A. M.

REPORTED BY: Charles E. Brandies, R.P.R., C.S.R
Official Court Reporter
Fifth Judicial Circuit of Florida
Ocala, Florida 32670

APPEARANCES: Mr. Jeffrey Pitos
Assistant State Attorney
Fifth Judicial Circuit of Florida
Ocala, Florida 32670
Attorney for Plaintiff

Mr. Ronald E. Pox
Special Assistant Public Defender
Post Office Box 319
[illegible]
Attorney for Defendant

PROCEEDINGS

THE COURT: Dan Houtly.

(Thereupon the Defendant Dan Houtly approached, accompanied by his attorney, Mr. Fox)

THE COURT: Before the Court at this time for a sentencing hearing is Dan Edward Houtly with Counsel, Mr. Ronald Fox, Public Defender, the Defendant having been found guilty after trial by Jury of First Degree Murder, a capital offense. The Court has received and reviewed a Pre-Sentence Investigation Report. Has Counsel and Defendant received a copy of this.

MR. FOX: Yes, we have, Your Honor, including, I should add for the record, the Confidential portion of the Pre-Sentence Investigation, which we both had an opportunity to review.

THE COURT: Are there any comments or statements on behalf of the Defendant at this hearing?

MR. FOX: Yes, Your Honor. First of all, state for the record at this time other than previously noted there is no legal cause why sentence should not be impos the Court having previously ruled on all matters pertain ing to that, but that we are here simply to present matt to be considered by you in determining the appropriate and just and legal sentence. Now, first of all, I'd lik to direct the Court's attention to the Pre-Sentence

Investigation. My comments are not to be critical of Paul Carr, the Officer who prepared the PSI but, rather, if it's critical of anybody it should be of Probation and Parole, in general, its method of presenting Pre-Sentence Investigation material. The reason I say that, and this doesn't apply just to Dan Routly's case but it comes more to the forefront when we're talking of a sentence -- the ultimate sentence and a serious matter of this kind. The circumstances, interestingly enough, in the PSI are obtained from reports of the Sheriff's Department. Paul Carr didn't hear any evidence at trial he didn't come to trial. We all sat through the trial, the Court, myself, Mr. Pitos. The Court Reporter and the Clerk no more about the facts of this case than Paul Carr knows. There's adherent danger in taking the circumstances of an offense from the police reports. Obviously, we know that's not evidence.

The Defendant's statement is also referred to in the Pre-Sentence Investigation. It's presented in -- as if it's a total fabrication. Seven times in the Defendant's statement it is said that he claims something to be true whereas the police reports are elevated to the position of being known given facts. For some reason, the Defendant is presumed to lie not only about the facts of the case but where his mother works, if his

father is dead, things of that nature, not that that is so significant, perhaps, but the Court relies heavily on these Pre-Sentence Investigations and I think we need to take them with a grain of salt.

The recollection of the State's witnesses are elevated to the status of uncontroverted facts while the Defendant's recollections are relegated to the pits of fabrication. He's the only one who knows what went on in this case. He's the only one that will ever know what went on in this case. Yet, Probation and Parole, for some unknown reason, not just in Dan Routly's case but in every case, presumes whatever the Defendant says is a total and absolute fabrication.

Then, you look at the PSI as to criminal history, we'll call it. You've got half a page of a Pre-Sentence Investigation dealing with juvenile arrest history. This Court full well knows, because you sit as the Juvenile Judge, as well as the Circuit Criminal Judge, you have many, many, many juveniles come before you and they are told that at no time will their juvenile record ever follow them into their adult life. It will never be considered by a Court, and the absolute contrar of that is true. We all know it. Why the Courts, the Prosecutors and Probation and Parole mislead juveniles into believing it will never be considered when the

contrary is obviously true, I will never know, and it certainly undermines the juvenile's faith in the system but look -- look at that section of the juvenile histor and look not at the quantity of entries there but look at the quality of the entries, if you want to look at it at all, and it's in there. I assume that the Courts want to consider that. It takes a half a page to expla carrying a concealed knife in high school and being a runaway. That's all that's in there, but it takes elev different entries. It looks like it's a continuing course of criminal conduct. Nothing could be further from the truth. The State took Dan Routly as a child from his parents' home and now, somehow, Probation and Parole wants us to use that in aggravation at his sentencing. Now, the State took him from his family; now, the State wants to take his life, and the reason for taking his life is the State took him from his family because he carried a knife when he was a juvenile in hig school.

The adult criminal record is likewise what I must presume to be intentionally inflated. If Probation and Parole were not so prosecution oriented, they would omit mere arrests and accusations, which the law clearly says you are not to consider anyway. Probation and Parole is presumed to know that. Yet, they include things that

are nol-prossed, dismissed and he's released from. For whatever reason it's in there, I think we all know the intent of including it in there. See the adult record for whatever it is: An attempted B and E, went into a high school and did criminal mischief when he was nineteen years old. That's not to say that that's not B and E. Of course that's B and E. We have those in Juvenile Court around here all the time, but take it for what it was. It's not a burglary; it's not an armed thing. There's no violence to it. It's -- and he got an appropriate -- more than a severe sentence, two and a half to five years. He also has an escape. Now, these are the two convictions. He walked away from a minimum security situation after his wife is alleged to have attempted suicide. He was gone for two months, the PSI says, an escapee from the Michigan State Prison. They couldn't find him, but he was living with his wife for that two months. Now, how hard did they look, if we're to believe the facts contained in the PSI. Not being a law enforcement officer or a detective, maybe I'm not qualified to make this statement but if I were looking for an escapee I just might drop by his wife's house prior to the passage of two months, but that's what it i That's also a non-violent-type situation, as you know not only from the PSI but from the testimony of the

Parole Officer that we had during the penalty phase.

Now, going on to Mr. Routly's social history as reflected in the PSI, and note these things: The Defendant's father reportedly died July of 1976. Probation and Parole doesn't see fit to confirm or deny that, apparently. Either Dan Routly's father died or the reports of his death are greatly exaggerated, which you would think Probation and Parole would take the time to find out rather than to impute some untruthfulness to Dan Routly about the existence or non-existence of his father. The Defendant claims his mother is a nurse. Well, you might think that Probation and Parole would want to talk to this man's mother who has known him for twenty-five years, see what she has to say, and while doing that ask her, are you a nurse, but they don't confirm that. He claims he has four brothers and three sisters. Why don't they find out if he's got brothers and sisters? Why don't they ask his brothers and sisters about this man? That's what you need to know to give an appropriate sentence. Defendant claims he was married and has a child. Is it too much to ask his ex-wife and his son what they think about this man? Those are the things you need to know to do an appropriate sentence, not ask John Pauls at the Jail, who has known him for six months, what should be done to him.

Probation and Parole says his employment is unstab because he worked for Phillip Morris in the junk busine in Ocala for two months -- or three months. That's all he was here. Mr. Morris is no longer in this business, nor is Mr. Gibson, the two employers that were talked about at trial. Now, if his employment is unstable, their business was likewise unstable. When could he have established employment stability? He couldn't nav and I ask you, in looking at the factual recommendation of the Court officials, to consider the recommendation of Gordon Oldham and the atmosphere in which it was made. The time that statement was made Mr. Oldham was facing re-election and opposition in that election, not to say that that would have influenced this statement but just consider that statement and the atmosphere in which it was given, and note that he is so concerned that he's not here today. Yet, had sentencing taken place last Monday, I have the sneaking suspicion he might have been.

MR. FITOS: I object, Your Honor. That has nothin to do with the sentencing matter and I ask that it be stricken from the record.

THE COURT: Overrule the objection.

MR. FOX: Now, the Confidential portion of the PSI was also presented in this case because of the serious

nature. I'm depressed to see that this section of the PSI is even more ludicrous than the factual section. Paul Carr states in the Confidential section some very interesting matters. He could've saved us the expense and effort associated with this trial. The Court, the Jury, the Prosecutor and the Defense lawyer need not have agonized through this trial because Paul Carr knows beyond a doubt that Dan Routly is guilty. If he had only told us that before we went to trial, we could've just brought him in and got this all over and done with. He makes that statement not having heard one shred of evidence. So, what good are these PSIs? Do they really do what we say they do? Absolutely not.

There's an anonymous trustee that we know about in the Jail who we presume to be Charlie Jones, by the way, and the Court may or may not be familiar with him but, in any event, it's purported that he heard Dan Routly confess to this murder and, therefore, the aggravation. Now, the Probation and Parole wants to say that because he did it he should get a death sentence, implying that they weren't so sure life would be adequat which, if it was not so serious, would be absolutely hilarious. Let's assume for the sake of argument that he did confess this to a trustee at the Jail. We heard a confession before the Jury. The Jury found him guilty

said, yes, Dan Routly did First Degree Murder. Is it aggravating to say that he explained it to someone, which we say is total and absolute fabrication and if they had somebody like that they'd have that trustee right here giving testimony, but they don't.

Now, referring to the personal statements that were gotten by Probation and Parole. This is the -- they obtained them, I feel, from the most -- the statements are most outrageous. They obtained them from the most biased, unreliable sources of sentencing recommendations imaginable, and I feel it's an insult to the interest of justice and fair play to ask police officers and jailers for sentencing recommendations about a man they have known only in the confines of the Jail and only for a period of six months. They talked to Phillip Morris who has known the Defendant two months out of twenty-five years. You will recall from the evidence that Phil Morris and Dan Routly had a fight over a woman. Yet, Phil Morris knows the Defendant is very dangerous and should not be let back out. In my mind, Phil Morris is much more dangerous to make such a sweeping generalization without any adequate basis -- to say he's known a man for two months of his entire life and he feels qualified to recommend what sentence this Court should impose. Bob Gibson, likewise. He hasn't had sufficient

basis to know either the Defendant or the facts of the case. These people were not witnesses to any murder. They've heard about it somewhere. This man worked for them, at best, for a period of two or three months. Yet, they feel qualified to make life and death recommendations. Charlie Brown, a Marion County Deputy Sheriff who is the original investigating officer, naturally, my feeling is that in that position he has some bias, just by the nature of his employment. His recommendation is not to let the Defendant out of confinement, and I would suggest to you that in all my remarks as to sentencing it's not that I'm talking about granting Dan Routly probation. The only choice you have is, if you impose the sentence recommended by the Jury, is twenty-five calendar years in the State Prison, which is a very serious sentence, we all know, and we should not lose sight of that when we're discussing the sentence in here. Neither would seem to be lenient. Then, we have comments from John Logue, the Classification Officer at the Jail. His statements are to the effect that he had no problem with Mr. Routly until after the conviction but now Mr. Routly is bitter and a problem at the Jail and, therefore, he recommends death. Now, the logic of that, if that be logic, shows us where our system has miserably failed. Mr. Logue, the

Classifications Officer, is saying a person incarcerated who is bitter, the only way to resolve that problem is to execute them. Well, we ought to execute the whole bunch, then. We ought to be saving the taxpayers some money, and everybody who is bitter and a problem in custody, which I'm sure most people are, ought then, according to John Logue, be executed because they are a problem at the Jail. They're bitter. Fred LaTorre, an officer who I have no idea why his remarks are in here, investigated what Probation and Parole calls a suicide attempt. LaTorre indicates that it was -- it wasn't really a suicide attempt; it was just an escape attempt. Mr. LaTorre must be experienced not only as a police officer but as a psychiatrist, psychologist and medical doctor. He's in no position to be making those kind of remarks and, regardless of his opinion, that coincident has nothing whatsoever to do with sentencing. Lieutenant Pauls, also the jailer, keep in mind when accepting his remarks, that Lieutenant Pauls is a defendant in a civil rights suit filed by Dan Edward Routly; so he has an interest in the outcome of the case. He is also, apparently, an amateur psychiatrist or psychologist. He indicates that Dan Routly has the Charles Manson syndrome, whatever that might be, and he implies that because Mr. Routly is an escape risk you must execute hi

an interesting remark coming from a man who is in charge of our jail down here. They can't keep him locked up, apparently; so the only way to stop an escape risk is to execute them. I think we need new jailers; may need a new jail. The people who work in the system don't have faith in their own prison walls.

The question that keeps coming to my mind in review the PSI is why doesn't Probation and Parole ask somebody who knows more about the Defendant or knows more about the case for a sentencing recommendation. Why not ask somebody other than police officers, jailers and prosecutors? Ask the Clerk of the Court who sat through the trial. Ask the Court Reporter who sat through the trial. They know more about the case than anybody referred to by Probation and Parole with, perhaps, the exception of Charlie Brown, and the Prosecutor. Why didn't Probation and Parole get comments from the Defendant's family, the Defendant's ex-wife? How about Colleen O'Brien who was granted immunity who testified against this man, who lived with this man, who she says has this man's child. She was right here. She convicted this man; yet, they don't even bother to ask her what she thinks is an appropriate sentence. They didn't even talk to the victim's family. Now, Mr. Fites might say, had they talked to the victim's family I'd be complainin

about that, which I would. Let there be no mistake about it, but why not ask them? They've suffered throu this incident. Give them a call to see what they say. They're going to have to live with this case forever, no matter what the sentence is. Surely, they should ha some input, and if you must have comments from jailers or law enforcement officers, why not get them from Michigan officers where this man lived all his life, where they know him personally, where he served four years in the Michigan State Prison. Ask them what they think, not John Pauls who has been down here six months and finds him to be an escape risk. The PSI clearly demonstrates that Probation and Parole is nothing more than an extension of the Prosecutor's Office. That's obvious from the source of the information, as well as the matter on which they present their information, and if we call it anything other than that we're just being oblivious to the obvious facts. I'd just ask the Court to receive the PSI the same way my comments or the comments of the Prosecutor. Knowing that we are on different sides of the fence, we naturally perceive these things somewhat differently. Do not view it as an unbiased recommendation because it isn't.

Let the record be clear that I personally oppose the death penalty in all cases, not that that's here or

there, but how an advanced society such as ours ca use State sanctioned killing of human beings and criminal justice in the same theory has got to be the ultimate in hypocrisy. When you say you're going to dispense justice by committing a killing and ending the life of a human being, you are necessarily talking out of both sides of your mouth, that execution is the answer in any case clearly demonstrates how society in general, and specifically the criminal justice system, has miserably failed, and you who support the death penalty must be saying that execution of certain human beings is good for society. Now, that was an idea of -- brought forth by Nazi Germany and is present today in Iran, that in certain circumstances society will say there are groups of people who the State has the author to end their life and by entering a death sentence in this case, or any other case, we are sanctioning that premise from which Nazi Germany arises, or that type of philosophy, and it's nothing less -- I'm not crying wolf it's got to be. That's the logical progression from the State sanctioning death of any individual. Is it a deterrent? It's a deterrent to the man you execute, obviously. He doesn't do it again, but every new murder that has happened is the best evidence that it is not a deterrent. The State of Florida burned John Spenkelin

until he smelled and the murder rate has done nothing b go up. So are those people deterred? Hardly. Is it punishment? It's punishment, but you're not punishing the Defendant. A death sentence does not punish the Defendant. It punishes everybody else connected with the case. A sentence of death is no punishment to a Defendant because nobody is immune to death. We're all sentenced to death the moment we first breathe life. We're all going to die. I don't care if you're a Supre Court Justice or anybody else, you're all going to die. We're all going to die. The only people you punish by sentencing death are those who know and love this Defendant. You would succeed only in punishing those who hav done nothing to violate society's rules. You also indirectly punish the victim's friends and family because they become part of an extended tragedy. Nothing you do will return the life of the victim, the so-called victim in this offense, but by sentencing Dan Houtly to death you've compounded the problem. Not only did the friends and family of the victim lose their friend or family member but, likewise, it carried on and resulted in the death of another human being which they will have to liv with, you will have to live with, I will have to live with and the Jury will have to live with.

The Romans in t[illegible] of Ceaser abandoned the death

penalty because it was outdated.

Robes Piere in 1791 observed that rather than a deterrent it diminished man's respect for the law. Other less advanced quote unquote societies have apparently found successful alternatives. We're oblige to find ours, though it's not easier and cheaper to do that.

There are presented in an article, Death by Decree by Colin Turnbull, an anthropologist, two irrefutable arguments against the death penalty. They are, one, mistakes; innocent people are executed. Now, if anybod in the Court system does not believe that to be true, they do not understand the system because it is necessarily true in our admittedly imperfect system. We all know how cases are resolved, even by the Jury, but we never know if in fact that man really committed the crime. This is the best syster we've got, but it is admittedly imperfect, and anyone who understands this system of criminal justice is not so naive as to say that an innocent man will never be executed or has neve been executed. Secondly, who actually dies is a matter of extremely bad luck. Statistics show that it discriminates against poor males, first of all, and, second of all, in our system there are so many variable it's almost up to women caprice as to who actually dies

depending on the specific Jury you have, the specific Judge you have, the specific lawyers involved, the Appellate Court, the Governor at the time, the Executiv Clemency Board; you never know, you never know how and when a sentence will be carried out. There are just simply too many variables. This article also points out who's responsible for this medieval abomination that we live with, and it's not the lawyers who are to blame, still less the prison officials who have to implement the law. It's those who make the law, and in a democracy that means the general public. The responsibility lies with the public and either the people are apathetic or else they act blindly out of an ignorance of the facts.

The death penalty is admitted, I think, by all who care to think about it to be barbaric, expensive and detrimental to the mental and physical health of al people involved. It does not contribute to the well-being of society in general, which should be its only justification. It persists merely to provide the public with an illusion that something is being done.

We had a big show. We executed John Spenkelink. We had it on radio, explained in fine detail, "Yeah, now smoke is coming up around his leg; it smells like crazy in here. Oh, yeah, he's dead; I'm not sure.

Let's hit him again. Let's get it on the radio", and what good did it do. It's a circus. Did it deter one murder? I hardly think so. Until we face the harsh facts of what happens on death row, in the execution room and in the office and homes of prison officials, lawyers and Judges, we are not entitled to have an opinion on the death penalty, let alone to call it reasonable and just. The public in general, we must assume, support the death penalty because it is our law. Unfortunately, they don't bother to come to Court. They don't bother to see what influence it has on the Judges, the lawyers, the Defendants, the victims, the Jurors; they don't participate in any of that -- the family members of everyone involved. They just blindly say that perhaps it's good.

But now that I've told you what my feelings are, what you will accept or reject, I think I must face the fact that the death penalty does exist and address myself to that, but I point out that neither the facts nor the law applicable to this case allow imposition of the death penalty. The Jury has recommended life, and those are the same people that found him guilty. They are the people who heard the facts of this case. If you disagree with their -- that their sentence recommendation is inappropriate, then you also cast some

doubt on your agreement with their finding of innocence or guilt, which is an obvious contradiction.

When a Jury has recommended life, the Florida Supreme Court has addressed this question many times as to the ultimate sentence to be imposed, and I'm quoting, now, the Florida Supreme Court in saying: In order to sustain a sentence of death following a Jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtual no reasonable person could differ; and I cite to the Court Clifford Williams versus State, which is Case Number 50,666, decided by the Florida Supreme Court June 12th, 1980. There was no more complete cite on that at the time. I also cite to the Court Provencens versus State, 355 Southern Second 111, Florida Supre Court 1978; also McCaskill versus State, 344 Southern Second 1276, Florida Supreme Court 1977; Thompson versus State, 328 Southern Second 1, Florida Supreme Court 1976; Tedder versus State, 322 Southern Second 908, Florida Supreme Court 1975.

In all of those cases the Jury had recommended life. The Judge entered a sentence of death. The Florida Supreme Court vacated that death sentence and remanded them to the trial court for imposition of a life sentence or did indeed impose a life sentence

themselves.

A death sentence will be vacated in the absence of any compelling reason for rejecting the Jury recommendation. For that proposition I cite Burch v. State, 343 Southern Second 831, Florida 1977 -- Supreme Court case.

Now, you had evidence at the sentencing phase about the Defendant's prior criminal activity, and I must point out to the Court at this time that the prior history of criminal activity is an improper, non-statutory aggravating circumstance not to be considered by the Judge or the Jury. I cite Mikenas versus State, 367 Southern Second 606, Florida Supreme Court 1979. Now, the Jury heard that business about prior record. In spite of that, they recommended life. Now, I'm suggesting to this Court, you should not concern yourself with that as an aggravating circumstance because it is an improper category and I would object to you entertaining it.

Another thing that should be pointed out in reference to aggravating circumstances, the Florida Supreme Court has said do not double count aggravating circumstances of, for example -- and which applies to this case, attempted robbery and pecuniary gain. Well, the Florida Supreme Court recognized that in a robbery

pecuniary gain is usually involved. So that's not to be counted as two aggravating circumstances but only as one, and I cite to the Court for that proposition Ford versus State, 374 Southern Second 496, a 1979 Florida Supreme Court case. That takes on added significance in this case, I think, where the Jury was instructed that if this murder took place during a robbery or a kidnapping, then you may find it to be First Degree Murder. So the Jury may very well have made this a more serious offense because it was in the course of a robbery. Then to say, well, that's also an aggravating circumstance is to double up, yet, again.

The aggravating circumstances listed in the statute are exclusive and no other matters are to be considered. I cite Miller versus State, 373 Southern Second 882, Florida Supreme Court 1979. In anticipating, perhaps unfairly, Mr. Pitos' remarks about what has happened in the life of Dan Routly since his conviction, there has been much news about that, much notariety, other cases originating -- that's not to be considered by you in arriving at a sentence in this case. It is not an aggravating circumstance by statute; therefore, you are not to consider it.

Whether the matter was heinous, atrocious and cruel, of course, depends on the facts of the case, much

that you heard what I heard from the witness stand. The case of Kampff versus State, 371 Southern Second 1007, Florida Supreme Court 1979. The Florida Supreme Court said where the Defendant shot the victim in the head, that is not an especially heinous, atrocious and cruel murder any more than all murders are atrocious so that was not an aggravating circumstance.

Also, intent to avoid arrest, which is an aggravating circumstance, is not present where the victim is not a police officer unless it's clearly shown the only motive for the murder was the elimination of a witness. In every murder, naturally, you could say it was done to avoid an arrest because a dead person does not turn you into the police. For the proposition that it's -- it's not to avoid an arrest, that's Menendez versus State, 368 Southern Second 1278, Florida Supreme Court 1979.

In Thompson versus State, decided July 3rd, 1980, by the Florida Supreme Court, Case Number 55,697, the Court there approved a finding that the age of twenty-six is mitigation as well as a lack of prior criminal history, pointing out to you at this time the Defendant is twenty-five years old.

I should also point out to you that the sentence or immunity of an accomplice should be considered by the

trial court in determining an appropriate sentence. For that I'll cite Smith versus State, 365 Southern Second 704, 1978; Salvatore versus State, 366 Southern Second 745. The State's chief witness was there, helped drag the body in the bushes, participated in the thing right from the very beginning, at least by her presence. She was granted immunity in exchange for her testimony; so, therefore, she's not here trying to convince you she should only get life on a second degree or only life on a first degree. She just walked right out the door, and that's a factor that you should consider in arriving at an appropriate sentence.

Lastly, I'd like to cite to the Court Brown versus State, 367 Southern Second 616, Florida Supreme Court 1979. The Jury recommended life. The Judge recommended death. The Supreme Court remanded it for a life sentence, and I cite this for the facts of the case. There the Defendant was sixteen years old, which is obviously younger than this Defendant, but he, with co-defendants, forced an elderly man into the trunk of a car. They drove him to a lake, forced the man into the lake, took his money. The Defendant struck the elderly man with fists and boards. Then, they returned to the car and took turns shooting the man with a gun. They left him for dead. As they were driving away, the elderly

gentleman tried to crawl out of the lake. They return to the lake, held his head under the water until he died from drowning, and the Florida Supreme Court said that is a life sentence -- where the Jury recommended life, and surely that does not compare to the facts of the case you have before you here today. To override the advisory sentence of the Jury, you must in effect judicially determine the Jury to be unreasonable peopl because that's the standard, and if you are to overrid them it's because reasonable men could not differ, and if you find that that's the case here, that the Jury was unreasonable in the recommendation of life, how then can you let your conscious accept the verdict.

I don't have anything further. Thank you.

THE COURT: Does the Defendant, Mr. Dan Edward Routly, have any comments in his own behalf?

THE DEPENDANT: No, sir.

THE COURT: Are there any comments or recommendati by the State?

MR. FITOS: Your Honor, the State of Florida would indicate in response to Mr. Fox' presentation, and it's certainly obvious that Mr. Fox had led us away from the facts of the case, that he has led us away from the fact that Anthony Bockini was murdered by this man who stands before us. Rather, he goes and he attacks

the Pre-Sentence Investigation, spends twenty minutes on that attack, and he talks about the fabrication -- that the allegation that Mr. Routly is not telling the truth, and I would bring the Court's mind back to the trial itself, and the Jury found, indeed, that this man lied on the stand. So are we to believe him now?

Mr. Fox would indicate that somehow this PSI is the most important thing that was prepared improperly but he doesn't touch upon the facts of the case or the murder of the other human being. No; he chooses to disregard that and draw the Court's attention to something else. He draws to the attention that perhaps one of the trial attorneys that tried the case is not here. That somehow is of great importance in the Court deciding the sentence in this matter, or the matter of whether or not certain cases are included on the record or not but, Your Honor, I submit to this Court again that it's Defense Counsel attempting to muddy the water, if you will, but let's look at what the statute directs us to do and let's look at his comments on the death sentence.

Your Honor, the law of the State of Florida is that we do have the death penalty and whether I like it or you like it or Mr. Al Lee likes it, who is sitting here, that doesn't matter, Your Honor. It is the law of the

State of Florida. I am to uphold the laws. Mr. Fox as an officer of the Court is to uphold the laws and Your Honor being an elected official of this County and the State, you also are sworn to uphold the laws of the State of Florida, whether you personally like the death penalty or not. The people have spoken to the Legislature and the death penalty is the law in the State of Florida, and like myself you also are sworn to uphold that law, Your Honor. So I submit that all of the philosophical presentations, the comparisons to Nazi Germany, if you will, by Mr. Fox have no place in the sentencing, for you also are to uphold the law.

Let's look at what the statute says, Your Honor, for that is what we are here to consider. We are not here to consider the words of Mr. Fox who brings up Mr. Routly's wife and child who, by the way, he left with another woman and he rode around Florida for some time -- to bring up the emotion. No, Your Honor; we look at what the statute requires, and under those aggravating circumstances the Defendant was engaged in a robbery when he committed this murder. What did he do Your Honor, you sat there as I did, that he entered this man's house, this elderly gentleman, a volunteer for the Marion County Hospital, he entered his house and when he came home he pulled that weapon, forced him into

the man's own bedroom, made him lie down on the bed, took his money and, if that wasn't enough, he just didn't leave him there, did he, Your Honor? No, sir. What did he do? He took that weapon or that -- that he had in his possession and he bound up that elderly gentleman in his own home, Anthony Bockini, and he carried him out to his own car and he threw him into the trunk and he drove to an isolated field, and you remember the facts as well as I, Your Honor, and because he didn't like what he did by pulling out those lights, he stopped the car, took Mr. Bockini out of that vehicle, put him on the floor and he went ahead and shot him, as Mr. Bockini, wide-eyed, looking up at this man as he shot, and he shot. There's no doubt about that, and as the aggravating circumstance indicat it was in the commission of a robbery, an aggravating circumstance that this Court must take into consideration pursuant to the laws of the State of Florida. Likewise, Your Honor, the capital felony was committed for pecuniary gain. Not only did he commit the robbery but he also took the man's car. He drove it up to Louisiana; pecuniary gain, two aggravating circumstance

What more could be heinous or atrocious than the sanctity of a man's dwelling, coming home after being a volunteer at the Marion County Hospital, coming home

to what, the man who could've walked out that back door but chose not to because he knew what he was going to d The sanctity of that dwelling meant nothing to him, nothing at all, just like the breaking and entering and his prior conviction mean nothing at all to him whatsoever, just like the people incarcerating him in the Michigan State Prison meant nothing at all to him, just like the life of Anthony Bockini meant nothing to him at all He chose not to leave that dwelling of Mr. Bockini's when he could've, but he came back and robbed him and he tied him up and he gagged him with his own bandana and he took him out to the car and he knew what he was going to do.

Each case must be decided on its own facts, Your Honor. That is indeed heinous; that is indeed atrociou

And what about the mitigating? We have three aggravating, Your Honor. Mr. Fox will say, take the ag of the Defendant into consideration. Well, let's look at the whole picture of this Defendant. We have individuals who are twenty-five and act nineteen. We have individuals who are twenty-five and act sixteen, and we have individuals who have led a hard life who are twenty-five and from their experience and cunning and knowledge could indeed be forty. This is the kind of man that we have before Your Honor, not chronological

years but the man, twenty-five going on forty. That's the only mitigating circumstance that this man has in his favor. Certainly, Your Honor, after reviewing those facts, they do not outweight the aggravating.

Mr. Fox would attack all the individuals that made statements, I suppose, except for his own and would indicate, my goodness, we didn't do a thorough job and we shouldn't even consider these people but, Your Honor I would submit it is like a puzzle, that each piece is important, to look at the man, each piece, and after that conviction each piece is important. What else is important? What did this man do after conviction? I submit, Your Honor, the Court can take into consideration that he attempted to smuggle a weapon into that Jail where he was incarcerated -- to do what with? To do what with?

Your Honor, the people of the State of Florida whom I represent by and through the Legislature who have made the death penalty the law in the State of Florida, contrary to any personal beliefs or philosophy by Mr. Fox or anyone else, and pursuant to the aggravating versus the mitigating, I would ask that the death penalty be imposed on this Defendant. There is no alternative, Your Honor, that this man be removed from society for that heinous and atrocious crime of murder of Anthony

Bockini, death by shooting, and as to the justice and fair play requested by Mr. Fox, I would ask Your Honor who spoke for Anthony Bockini that evening when this ma: shot him to death. No one. Death, Your Honor. Thank you.

THE COURT: The Court -- are there any other matter on behalf of the Defendant at this time?

MR. FOX: Your Honor, just -- not to be any more long-winded than I've already been, but just to suggest that the evidence presented at trial should be considere by you and in the penalty phase before the Jury. My position is that the mitigating factors present are the Defendant's age, lack of significant criminal history and also the psychiatric reports which were received at that time.

THE COURT: All right. This concludes the sentencing hearing. The Court will order a transcript of this hearing and after a review of the transcript of the hearing and all the matters that are to be considere in this case, the Defendant will be notified when to return to Court for the imposition of sentence in this case. Thank you; that will be all at this time. The Defendant is remanded to custody.

MR. FOX: Thank you, Your Honor.

(Thereupon the proceedings ended).

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF MARION)

I, CHARLES E. BRANDIES, Certified Shorthand Reporter, Registered Professional Reporter, and Official Court Reporte Fifth Judicial Circuit of Florida, do hereby certify that th Sentencing in the case of State of Florida versus Dan Edward Routly, Case Number 79-1270, was heard at the time and place set forth in the caption hereof; that I was authorized to and did report stenographically the proceedings, and that the foregoing pages, numbered 1 through 31, inclusive, constitute a true and correct transcription of my said stenographic report.

WITNESS MY HAND AND SEAL this 16th day of September, 1980, at Ocala, Marion County, Florida.

Charles E. Brandies

Charles E. Brandies C.S.R.
Marion County Court House
Ocala, Florida

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR MARION COUNTY

CRIMINAL ACTION.

CASE NO. 79-1270

STATE OF FLORIDA,

Plaintiff,

vs.

DAN EDWARD ROUTLY,

Defendant.

PROCEEDINGS: Sentencing

BEFORE: The Honorable Carvin D. Angel
Circuit Judge
Fifth Judicial Circuit of Florida
Ocala, Florida 32670

PLACE: Circuit Courtroom
Marion County Courthouse
Ocala, Florida 32670

DATE AND TIME: November 24, 1980, 9:00 a.m.

REPORTED BY: Charles E. Brandies, C.S.R.,
R.P.R., Official Court Reporter
Fifth Judicial Circuit of Florida
Ocala, Florida 32670

APPEARANCES: Mr. Jeffrey Fitos
Assistant State Attorney
Fifth Judicial Circuit of Florida
Ocala, Florida 32670
Attorney for Plaintiff

Mr. Ronald E. Fox
Special Assistant Public Defender
Post Office Box 319
Umatilla, Florida 32784
Attorney for Defendant

P R O C E E D I N G S

BY THE COURT: On the Sentencing Docket, Dan Edward Routly.

(Thereupon, the Defendant Dan Edward Routly approached, accompanied by his attorney, Mr. Fox).

BY THE COURT: Before the Court at this time for sentencing is Dan Edward Routly. This is his Counsel, Mr. Ronald Fox. I would ask Counsel at this time if there is any cause why the Court should not impose sentence.

BY MR. FOX: Your Honor, as to legal cause, there' one matter that I would like to recite for the purposes of the record as to a legal prohibition to sentencing going forward at this time. The legal objection to sentencing proceeding at this time will be based on the case of Dan Edward Routly, Plaintiff, versus Larry Jerald, et al., Defendant, Case Number 80-91, a Circuit -- or a civil case, rather, presently pending in the United States District Court for the Middle District of Florida, Ocala Division. Without reciting -- there has been an order entered in that case, and I would like simply to recite some of the pertinent portions of that order into the record at this time. It was signed by The Honorable Charles Scott, this order, on the 5th day of November. From the order, it's not clear -- it was

entered in November, '80. I'm not certain of the date. Essentially, it says that -- and I'm quoting now from the order: Although the Plaintiff filed his Complaint under 42 U.S. Code, Section 1983, the Plaintiff is seeking relief in the nature of habeas corpus. Consequently, on July 8th, 1980, this Court stayed the Plaintiff's case pending his exhaustion of State remedies via a Petition for Writ of Habeas Corpus. In that order, the Plaintiff was directed to advise the Court when he had exhausted his State remedies and to provide the Court at that time with substantiation of said exhaustion. Plaintiff has complied with the Court's order by filing a decision from the Fifth District Court of Appeals of the State of Florida denying Plaintiff's Petition for Writ of Habeas Corpus. As the Plaintiff has now exhausted his State remedies, he can bring this habeas corpus action in Federal Court citing Preiser versus Rodriguez, 411 U.S. 475, 1973. Consequently, the Clerk of the Court will be directed to transfer this case to the Habeas Corpus Docket. Issued at Jacksonville, Florida, this 5th day of November, 1980, The Honorable Charles R. Scott, United States District Judge.

And the other matter to cite in that particular regard would be Florida Statute 79.12, which refers --

which says: When in any criminal prosecution a Writ of Habeas Corpus is applied for by any person charged with any criminal offense and the accused has been remanded to the custody of the Court to which such application is made, and my argument -- that would not be the Federal Court -- a supersedeas of that order made on appeal being taken to an appellate court shall not prevent the State from proceeding with the prosecution of the accused pending the decision of the appellate court on the habeas corpus, but the State may prosecute the accused as if the appeal had not been taken in habeas corpus. If the accused is convicted of the charge, the Court shall withhold imposition of sentence and final judgment until the appellate court has determined the issues presented in the habeas corpus. Now, the State Court has determined the issues in the habeas corpus. They have -- and Mr. Routly has necessarily had them determine that to exhaust the State remedies, but the habeas corpus is now pending in the Federal Court pursuant to Judge Scott's order, and I would suggest to the Court that for those reasons that's a legal prohibition to sentencing going forward and I don't have anything else to add other than that.

On the legal prohibition to the sentence, I would however, raise at this time an objection to a sentence

other than life in prison at this juncture in that this trial was concluded July 18th. We were here till the late hours of the night arguing to the Jury so we could get an advisory reading from them. It's now late November and we're here awaiting sentencing, and I'm suggesting to the Court that based on that delay in time that Mr. Routly has been awaiting sentencing in the Marion County Jail, that to impose any sentence, let me say, would be cruel and unusual punishment. To impose any sentence other than life would be cruel and unusual punishment, based on the facts -- the long delay which Mr. Routly has had to face in the Marion County Jail.

The only other matters I have to say in reference to sentencing are not any legal prohibition to going ahead with sentencing but, rather, the legal guidelines to what a -- my understanding of the law is -- a legal sentence in this case. We've previously cited to the Court many cases wherein the Jury recommended life and the Court imposed death. The Supreme Court reversed, or vacated the death penalty, at least, and imposed a sentence of life. At one prior proceeding in this case, the Court indicated that I had not provided the Court with cases wherein the Jury had recommended life. The Judge had imposed death and the Supreme Court had

upheld the imposition of death. Since that time I have found certain cases where that is the case and I am equally as certain that the Court has found those cases with or without the assistance of the State Attorney.

Recently, James Leroy Pippin's death penalty was vacated by the Florida Supreme Court. He was convicted of the first degree murder of his parents over a $64 credit card bill, some type of discussion that he had planned this murder and a suggestion that it was for the $64 credit card bill. Anyway, he fired -- Mr. Pippin, the evidence showed, fired repeatedly at the parents -- the back of their heads until his pistol was empty. He then reloaded and emptied it again in the back of his parents' heads. Now, the Supreme Court said that didn't justify the imposition of the death penalty; they vacated it. The significance of the Pippin case to me, and perhaps to the Court as it relates here, is that Justice Adkins and Boyd dissented in the Pippin case, and Justice Adkins dissents oftentimes when the death penalty is vacated, and in his dissent he listed six cases wherein the Jury had recommended life. The trial judge had overruled that recommendation and imposed death, and that death sentence was upheld by the Florida Supreme Court. So there are cases wherein that happens, but if -- if the

Court has read certain of these cases, and I'm sure that you have, you have found in those situations that the justification for imposing the death in disregard of the Jury's recommendation is that the crime or the murder has been found to be heinous, atrocious and cruel. One maybe striking example is Gardner versus State, 313 Southern Second 675. This was a Citrus County case; Judge Booth, who was a Circuit Judge -- still in our Circuit, he disregarded the Jury recommendation of life. He imposed death, and the Supreme Court with two dissents affirmed that imposition. They found it was -- that murder was especially heinous, atrocious and cruel, based on medical testimony that the decedent's body bore at leas 100 bruises, large patches of healthy hair had been pulled from her head. There were tears inside her vagina caused by a broom stick, bat, or a bottle, and that the bone located in the pubic area had been broken into small pieces by a blunt instrument.

I would never say there's a case where the death penalty ought to be imposed. I am firmly committed tha it should never be imposed, but the facts of the Gardner case certainly show what the Supreme Court considers to be a heinous, atrocious and cruel murder, and I'm certain that that would probably fit the

definition.

In the Routly case, the case that's before you now, recall the medical testimony that death was caused by a gunshot wound to the head, not to say that that's a good way to die, just to say that that is not heinous, atrocious and cruel, and in fact the Court has held in situations where one gunshot wound to the head is -- is not.

Just citing for the record the other cases where the death penalty has been imposed in contravention of the Jury recommendation is Sawyer versus State, 313 Southern Second 680. That's the Supreme Court of Florida, 1975, and there I distinguish that Defendant from Mr. Routly's case on this, that there was an armed robbery but the Defendant had a prior record of multiple robberies. In fact, the Court was aware that he had 13 pending armed robberies against him at the time. He had a two hundred dollar a day drug habit, and that the -- during the course of the trial the Defendant had communicated to the bailiffs that he would take reprisals against persons conducting the trial if he had been found guilty. Also in the Sawyer case, the Appellant put on no evidence in mitigation, which you will find in several of these cases where th Court disregarded the Jury recommendation. The

Appellant put nothing on in mitigation, which we did in the Routly case.

For the purposes of the record, I will also cite to the Court Hoy versus State, 353 Southern Second 826. It's a murder that happened down in Dunedin, a double murder rape where the Defendant is found to have raped a 16-year old girl and killed her and her boyfriend. There, the Jury recommended life; the Judge imposed death. It was upheld. There they go through the co-defendant sexually assaulting the 16-year old young lady, both vaginally and anally, shooting her boyfriend in the face in her presence and then ultimately shooting her twice in the head. They said, that we will uphold the death penalty. Of course, it was in the commission of a rape, you must remember, and the mitigating evidence there was almost non-existent.

In Barclay versus State, 343 Southern Second 1266 the Jury recommended life. The Judge imposed death. That was upheld. There, the defendants were part of a group that termed itself the Black Liberation Army whose sole purpose was to indiscriminately kill white people and start a revolutionary war, which they proceeded to do in this case, and the death penalty was imposed.

The other matter that I need to cite to the Court

is Douglas versus State, 328 Southern Second 18, a 1976 Supreme Court case. There we have Justice England dissenting, but the -- there the Defendant took a husband and wife into the woods, killed the husband, raped the wife, had beaten the husband over the head with the butt of the rifle until it shattered in the presence of the wife, and ultimately ended up killing him.

The last case I'll cite is Dobbert versus State, 328 Southern Second 433. There there's no mitigating evidence presented. I think all that needs to be said about the Dobbert case, perhaps it's more -- more shocking than any of the cases previously cited. The Defendant at the time of sentencing stood convicted of the first degree murder of his nine-year old daughter, the second degree murder of his seven-year old son, the torture of his 11-year old son and the child abuse of his five-year old daughter. In the -- the nine-year old daughter he had killed, he had beat her in the head until it was swollen. He had burned her hands. He had poked his fingers in her eyes, beat her in the abdomen until it was swollen as if she were pregnant, knocked her against the wall when she fell, kicked her in the lower part of the body, held her under water in both th bathtub and toilet, kicked her against the table which

cut her head. Then he sewed up the wound with a needle and thread, scarred her head and body by beating her with belts and boards, and so on and so on and so on, and it goes on: Made no effort to get her medical help, kept her out of school so nobody would see the bruises, kicked her in the stomach with shoes on, beat her continuously for 45 minutes at a time, choked her on the night she died, and when she stopped breathing he placed her body in a plastic garbage bag and buried her in an unmarked grave.

So it's not a situation where this Court -- or, rather, where a court cannot disregard the Jury recommendation and be upheld and impose a legal sentence, but when that's going to happen, and I won't say anything further, the principle of law is that the evidence must be of such a nature that the Jury -- you find that -- from the evidence that the Jury were unreasonable people, that reasonable minds could not differ as to the sentence, that the sentence should be death, and in these cases that I've cited to the Court I suppose reasonable minds could not differ because of the facts of the case they were so heinous, atrocious and cruel that they were upheld, but in the absence of that, which we have here, the only legal sentence this Court could impose would be a sentence of life, and I

know I don't have to remind the Court of this, but that sentence carries with it a minimum mandatory of 25 calendar years in the State Prison, which in and of it -- depending on your philosophical outlook, may be a more serious penalty than death itself. I don't have anything further, and I would ask the Court to inquire of Mr. Routly if he'd like to say anything prior to imposition of sentence.

BY THE COURT: Mr. Routly, do you have any statements on your behalf before the imposition of sentence?

BY THE DEFENDANT: No, sir.

BY THE COURT: Any response by the State?

BY MR. FITOS: Yes, Your Honor. In response to the legal objections that there is a legal cause to not dispose of the sentencing matter on this date, we'd indicate that the Statute cited, we reflect, would anticipate the filing of writs prior to a trial. If Your Honor would interpret the particular Statute in the way Mr. Fox requires you to interpret it, then each and every defendant after having been found guilty, his defense attorney would automatically file a writ which would toll the sentencing. Obviously, it's not happened. It's not what the Legislature had intended in the Statute under the close reading of the wording. In

addition, there is no doubt that there is a pending civil suit in this matter which may be interpreted pursuant to that order as a writ. I would indicate that this is a normal procedure in the appellate proceeding and that there is no cause why this man should not be sentenced at this time, and it would in no way affect that particular writ. That's all I have to address as to that particular point. We would ask that the Court would proceed with the sentencing, finding no legal cause to prevent that sentence.

As to the factual allegations as to the case law and as to the Statute which this Court must consider on this date, most specifically Florida Statute 921.141 which Your Honor knows is the controlling Statute in the sentencing of capital cases, that under sub three we would indicate to the Court that the wording of sub three, the findings of a court -- the finding of death even though an advisory sentence has been rendered by a jury, would indicate that the Court's obligation under the law is to look at the facts of this case and put them within the aggravating and mitigating circumstances under that Statute. Those had been presented at earlier sentencing hearings and the Court is well familiar with those. I would ask the Court to look at those aggravating circumstances and I feel tha

the applicable ones in this particular case are a, d, f, g and h, and those being in reverse order, the heinous, atrocious or cruel aspect, the capital felony was committed for pecuniary gain, that the capital felony was committed while the Defendant was engaged or was an accomplice in the commission or attempt to commit robbery, burglary and, in fact, did, and that in addition, although the State does not charge him with that, and that in addition the capital felony was committed by a person under sentence of imprisonment, this man standing before you having been on parole and had absconded from that parole, the interpretation of that matter having been indicated, that parole does no release the man from the sentence but is giving him an obligation to go back into society under the penalty o should he flee or violate a law he is immediately incarcerated again. He was on parole and he fled the State of Michigan.

Based on those criteria, Your Honor, and weighing those with the mitigating circumstances as the Court i sworn to do, the only mitigation which could possibly be argued is the age of the Defendant at the time of the crime. However, even that, Your Honor, I could se it if the man was 17 or 18 or had no prior crime -- criminal record, but this is not the case here. This

is not the case here.

Let's look at the Statute; let's look at the case law that Mr. Fox would have the Court look at, and I think the point that needs to be made here amidst all this case law is the following, that each case must be analyzed based upon the facts as the Court sees it, and the guidance as Mr. Fox had indicated is the Supreme Court has ruled both ways. There are different interpretations, and what the Court has to do is not to be concerned with whether it shall be overruled or not overruled but simply look at the facts and apply the Statute that is required to do, and I would submit, Your Honor, if the Court in this matter looks at these facts and takes the aggravating and the mitigating -- takes the aggravating and mitigating and is desirous of upholding the law as foreseen in this Statute, then there is no other decision but death, and we would ask the Court not to shirk from its duty. Certainly, the Prosecutor, the Defense Attorney, treat any capital case very seriously, and I would understand the Court's concern to sentencing anyone to the death penalty, but we would ask on behalf of the people of the State of Florida that the law be carried out, that this individual, guilty under the aggravating circumstances and not being absolved by the mitigating would be

sentenced to that penalty of death for murdering -- there is no other nicer way to say it -- than murdering Anthony Bockini, and we would talk about heinous, atrocious and cruel. What could be more heinous, atrocious and cruel than an elderly gentleman in his retired years, having come down as -- having a productive life and working hard for that retirement and having himself a small home in Marion County, because Florida is a good place to live, and having that little home and his wife having died and, as you recall from the facts, having a criminal, a murderer, come into his home, the sanctity of that dwelling, where an individual can expect to be free from harm and intrusion, and as the facts would indicate that the man not only entered that home but tied him up, took hi -oney, pushed him on the bed, and the man was in fear for his life, as well he should be, and he knew that his time had come and he was so afraid -- in that sanctity of his home; that elderly gentleman being carried out of his own home, tied up, placed in his own car, knowing that he was going on the death ride. Just imagine, Your Honor, what went through his mind on that death ride in that closed trunk in his own car, as he scratched and scratched to try to get out, tearing off the wires, hoping in vain that he could escape, but he

couldn't. What is more heinous, atrocious than someone riding around in his own closed car, knowing that death is near, knowing that his life is going to expire because a murderer is going to take it -- than the man who stands before you, and there's no pleasant way to say it any other way. Defense attorneys try to personalize; defense attorneys try to remove it from what the facts were. There's no way to paint this murder in the first degree other than it is heinous, atrocious and cruel, and he stopped the car in a very, very remote area, and he threw Mr. Anthony Bockini, that retired individual who came to Florida to seek peace in his old age and retirement, trusting in the laws of the State, and he threw him on the ground and he took that pistol and he shot him dead as the old man looked up at him, in fear of his life as well he should have been, and Mr. Anthony Bockini is murdered, and there's no other nice way to say it. There is no way to make those facts anything but heinous, atrocious and cruel. When you weigh everything else, Judge, as the Statute requires, aggravating, the mitigating cannot weigh it down. I think the only choice, Your Honor, is to uphold the trust that the people have put in you as their elected Circuit Judge and do as the Statute, with that aggravating circumstances, requires, not tha

it's ever not a difficult situation for any Judge but the law requires that the man who murdered in cold blood Anthony Bockini be given that sentence of death, based on the facts and not anticipating what the Supreme Court might or might not do, for they review all of these sentences.

On behalf of the People of Marion County, and the People of the State of Florida, I ask that Dan Edward Routly be sentenced to death by electrocution, that the Judge would uphold the laws of the State of Florida and the truth which the people have put in him. Thank you Your Honor.

BY MR. FOX: Excuse me, Judge. If I may just very briefly, and I promise to be brief this time. Maybe - perhaps one who is less familiar with the system here in Marion County might -- might have got the impression that Mr. Fitos was suggesting to you that the imposition of the death penalty might be politically advantageous and a good way to get votes, but I know the Court is beyond that; so I'll just disregard that.

As far as doing what the People of the State of Florida want to do, you told the People of the State of Florida who were in that box over there, all twelve of them, what the law was and how they should interpret it, and the law says they must be convinced beyond a

reasonable doubt as to the propriety -- appropriateness of the sentence. They deliberated for well in excess of an hour and came back to you and said that they felt an appropriate sentence was life. They had all of those burdens. They listened to Mr. Fitos' argument, very similar in tone and substance as you have heard today, and they were not swayed by that argument. They listened very attentively. They were twelve people; you are one man. Of course, you are the Judge and you do have the final say, but certainly you must take into consideration their recommendation. They did it at the conclusion of the trial, based on the evidence in the trial and after the trial. As far as myself and other defense attorneys trying to depersonalize a case such as this, I don't think anything could be further from the truth. I will live with this case forever, as will you and will the Prosecutor, and I have not discussed this with my client at this point but I'll do it, anyway. In an effort not to personalize the case at all, we extend our sincerist invitation to Mr. Fitos to be personally present in the Florida State Prison at the time death penalty is imposed, if that's the sentence of this Court, and that he feels that that's appropriate. I think we all ought to be there and watch it carried ou

I think the law is very clear on this case. The fact that the victim's wife had died and he's a retired man of course that doesn't matter. I don't make light of all that. It's a murder; of course, it's a murder. It's a serious crime. That's why we're here, but I think the law and the facts applicable to this case an the recommendation of the Jury should be upheld. Normal situations the State -- that sentencing is telling you how sacred the jury system is and that you should impose their will, and this is the one exceptio when they seem to feel that the jury is not quite so reliable. I don't have anything further. Thank you.

BY MR. FITOS: The State has nothing further, You Honor.

BY THE COURT: Before the Court for sentencing stands Dan Edward Routly, assisted by Counsel, Ronald Fox. Counsel has suggested a legal cause why the Cour should not proceed to sentence, that being a proceedin pending in the Federal District Court for habeas corpu The Court finds that that is an insufficient cause and that there is no legal cause why the Court should not proceed to impose sentence at this time in this case.

The Defendant was tried upon an Indictment for first degree murder returned by the Grand Jury i panel in the Circuit Court of the Fifth Judicial Circuit in

and for Marion County, Florida, for the Fall Term of 1979. The said Indictment charged the Defendant with the premeditated murder of Anthony Francesco Bockini by shooting him with a firearm. The Jury returned its verdict on said Indictment on July 18, 1980, finding the Defendant guilty as charged of murder in the first degree, and upon said verdict the Court adjudicated the Defendant guilty as charged of murder in the first degree. The Jury which tried the Indictment was impaneled to hear evidence in aggravation and mitigation and to render its advisory sentence pursuant to Section 921.141 of the Florida Statutes. On July 18, 1980, that Jury recommended that the Court impose a sentence of life imprisonment upon the Defendant. The Court has considered the evidence presented at trial upon the Indictment, the evidence presented at the separate sentence proceeding on the issue of penalty, the Jury's advisory sentence, the pre-sentence investigation report prepared by the Florida Department of Corrections, Probation and Parole Services, and the statements and recommendations of Counsel for the Defendant and the State presented at a sentencing hearing on September 15, 1980, and at this proceeding today. Upon consideration of all of the said matters, the Court hereby finds the following aggravating and

mitigating circumstances required to be considered by Section 921.141 of the Florida Statutes.

As to the aggravating circumstances, the Court finds that prior to the proceedings today the State had not contended nor had it proven that this capital felony was committed by a person under sentence of imprisonment or that this Defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person, or that this Defendant knowingly created a great risk of death to many persons or that this capital felony was committed to disrupt or hinder a lawful exercise of any governmental function for the enforcement of the laws. The State has contended at this proceeding that this capital felony was committed by a person under sentence of imprisonment. The Court, therefore, finds that these four aggravating circumstances do not apply to this capital felony, the State, having not previously intended on proving that three of these aggravating circumstances exist, and I find that the State has not proven that the additional aggravating circumstance that the capital felony was committed by a person under sentence of imprisonment has not been proven in this proceeding and I find that that aggravating circumstance does not exist in this case.

As to the other five aggravating circumstances, the Court finds that it has been proven beyond and to the exclusion of any reasonable doubt that this capital felony was committed while the Defendant was engaged in the commission of kidnapping and that this capital felony was committed while the Defendant was engaged in flight after committing a burglary, and further finds that this capital felony was committed for the purpose of avoiding or preventing a lawful arrest, and further finds that this capital felony was committed while the Defendant was engaged in the commission of a robbery and while the Defendant was engaged in flight after having committed a robbery and, therefore, this capital felony was committed for pecuniary gain, and the Court further finds that this capital felony was especially heinous, atrocious and cruel, and that this capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

As to the mitigating factors under Section 921.141 of the Florida Statutes, the Court finds that the Defendant has not contended nor has he proven that he has no significant history of prior criminal activity or that the capital felony was committed while he was under the influence of extreme mental or emotional

disturbance, or that the victim was a participant in the Defendant's conduct or consented to the act, or that he was an accomplice in the capital felony committed by another person, and his participation was relatively minor or that he acted under extreme duress or under the substantial domination of another person, or that the capacity of the Defendant to appreciate th criminality of his conduct, or to conform his conduct to the requirements of law was substantially impaired. Therefore, the Court finds that none of these six statutory mitigating circumstances exist in this case.

The only statutory mitigating circumstance which the Defendant urges upon the Court is his age at the time of the crime.

Having observed the Defendant's conduct throughout this trial and having considered the evidence of this crime, the pre-sentence investigation report, the psychiatric evaluation of Doctors Rafael J. Gonzalez and Fausto A. Natal, the Court finds that the Defendant was 25 at the time of this crime and that his age at that time is not a mitigating factor in this case.

In addition to the statutory mitigating circumstances, the Defendant contends as mitigation in this case the fact that an accomplice was granted immunity, and also the holding of the Supreme Court in

Brown versus State, 367 Southern Second 616. The Court finds from the Defendant's own admission that the only person present at the commission of this capital felony knew absolutely nothing about the Defendant's plan or intention to commit this crime and, therefore, there was no accomplice to the commission of this crime for which the Defendant was solely responsible.

The Court has considered the facts of Brown versus State and finds that they are distinguishable and that that case furnishes no evidence of mitigation for this case. Therefore, the Court finds that absolutely no mitigating circumstances exist in this case, statutory or otherwise.

Considering that five statutory aggravating circumstances exist in this case and that no mitigating circumstances exist, statutory or otherwise, the Court finds that this is an aggravated capital felony in which the death penalty is presumed to be the appropriate penalty unless the mitigating circumstances outweigh the aggravating. Since there are no mitigating circumstances, the Court finds that they do not outweigh the aggravating circumstances. The Jury has recommended a life sentence. The Court finds two compelling reasons to reject that recommendation. First, that this is an aggravated capital felony in which the law of this

State presumes that death is the appropriate penalty unless outweighed by mitigating circumstances, of which there are absolutely none in this case and, second, that in comparison to the facts of other capital cases in Florida in which the death penalty has been upheld, equal justice under the law would have a hollow ring if death were not imposed in this case.

The Defendant having been asked if he had any cause to show why sentence should not be imposed in this cause and the Court having found that no such cause has been shown, it is, therefore, the judgment, order and sentence of the Court that the Defendant, Dan Edward Routly, for the crime of which he has been convicted, that is murder in the first degree, be electrocuted until he be dead in the manner directed by the laws of the State of Florida. It is further ordered that the Defendant, Dan Edward Routly, be committed to the custody of the Department of Corrections and be imprisoned until he be electrocuted, until he be dead, in the manner directed by the laws of the State of Florida.

It is further ordered that the Sheriff of Marion County is hereby directed to deliver the said Defendant Dan Edward Routly, to the Department of Corrections, together with a copy of the judgment and sentence

entered in this case.

It is further ordered that the Defendant, Dan Edward Routly, shall pay the sum of one dollar pursuant to Section 943.25 of the Florida Statutes.

The Defendant is advised of his right to appeal from this judgment and sentence within 30 days from this date, and the Public Defender is appointed to represent the Defendant on this appeal.

There being no other matters at this time in this case, the Defendant is remanded to the custody of the Sheriff, pursuant to this judgment and sentence.

BY MR. FOX: Excuse me, Your Honor. For purposes of clarifying the record, I would ask that the Court give Mr. Routly credit for time served from December 5th, 1979, to today's date, in the event that this sentence might at some later date be altered.

BY THE COURT: If the State has no objection, I have no verification of that date. I assume that is the correct date.

BY MR. FITOS: The State would have no objection to credit for time served during the time of custody, if Mr. Fox would submit to the Court that date, and I would be able to check it at that time, in order form.

BY MR. FOX: And, also, if I may beg the Court's indulgence, I just -- again for purposes of clarifying

the record, I ask that if -- realizing you don't have to answer this question for me, if the evidence of aggravating circumstances came from the penalty phase of the trial or from the trial of the case in chief; in other words, the fact that it was committed during the course of a robbery, that was committed to -- in the kidnapping -- is the Court relying on evidence presented during the penalty phase or evidence presented during the trial itself?

BY THE COURT: First of all, with respect to credit for time served, the Defendant will be granted credit for time served. I assume the record will speak for itself as to when that should commence.

BY MR. FOX: And it should.

BY THE COURT: And so far as the matters that the Court has taken into consideration in this case, I believe those have been adequately dictated into the record.

BY MR. FOX: Fine; thank you very much.

BY THE COURT: That will be all at this time.

(Thereupon, the proceedings in the case ended).

C E R T I F I C A T E

STATE OF FLORIDA)

COUNTY OF MARION)

I, CHARLES E. BRANDIES, Certified Shorthand Reporter, Registered Professional Reporter, and Official Court Reporter, do hereby certify that the sentencing in the case of State of Florida versus Dan Edward Routly, Case Number 79-1270, was heard at the time and place set forth in the caption thereof; that I was authorized and did report stenographically the proceedings, and that the foregoing pages, numbered 1 through 28, inclusive, constitute a true and correct transcription of my said stenographic report.

WITNESS MY HAND AND SEAL this 12th day of January, 1980.

Charles E. Brandies

Charles E. Brandies, C.S.R.
Marion County Court Reporter
Ocala, Florida

END OF DOCKET